

United States 12  
Circuit Court of Appeals  
For the Ninth Circuit.

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REGIONAL AGRICULTURAL CREDIT COR-  
PORATION OF SPOKANE, WASHING-  
TON,

Appellant,

vs.

E. B. CHAPMAN, as Administrator of the Estate  
of Simon T. Douglas, Deceased,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Montana.

FILED

DEC 15 1941

PAUL P. O'BRIEN,  
CLERK



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Affidavit of Service of Notice of Petition and Bond for Removal.....	26
Affidavit of Service of Petition and Bond for Removal .....	18
Answer and Cross Complaint.....	78
Appeal:	
Designation of Additional Portions of Record on (District Court).....	341
Designation of Contents of Record on (Circuit Court of Appeals).....	346
Designation of Contents of Record on (District Court) .....	330
Notice of .....	328
Statement of Points on (Circuit Court of Appeals) .....	344
Statement of Points on (District Court).....	336
Attorneys, Names and Addresses of.....	1
Bond on Removal.....	23
Brief of Defendant on Demurrer.....	39
Brief of Plaintiff on Amended Demurrer.....	36

Index	Page
Brief of Plaintiff on Defendant's Objection to, and Motion to Amend Findings, etc.....	320
Brief, Reply, of Defendant, on Demurrer.....	67
Brief, Reply, of Plaintiff, on Demurrer.....	58
Caption .....	2
Certificate of Clerk to Transcript on Appeal.....	342
Certificate of Clerk to Transcript on Removal	28
Complaint .....	3
Complaint, Amended .....	73
Decision, Memorandum of.....	290
Demurrer, Amended .....	31
Demurrer to Amended Complaint.....	76
Designation of Portions of Record on Appeal (Circuit Court of Appeals).....	346
Designation of Additional Portions of Record on Appeal (District Court).....	341
Designation of Portions of Record on Appeal (District Court) .....	330
Findings of Fact and Conclusions of Law.....	302
Judgment .....	308
Motion for New Trial.....	309
Motion to Strike From Reply.....	96
Motion to Vacate Judgment, and to Enter Judgment for Defendant.....	311
Names and Addresses of Attorneys.....	1

<b>Index</b>	<b>Page</b>
Notice of Appeal.....	328
Notice of Motion to Strike From Reply.....	98
Notice of Petition and Bond for Removal.....	16
Objection to Designation of Portions of Record on Appeal .....	339
Objections to and Motions to Amend Findings of Fact and Conclusions of Law, etc.....	313
Order Denying Motion for New Trial, Motion to Vacate Judgment, etc.....	327
Order Overruling Demurrer to Amended Com- plaint .....	72
Order of Removal.....	27
Order Sustaining Amended Demurrer.....	35
Order for Transmission of Original Exhibits to Circuit Court of Appeals.....	341
Petition for Removal.....	20
Removal:	
Affidavit of Service of Petition and Bond on .....	18
Bond on .....	23
Certificate of Clerk to Transcript on.....	28
Notice of Petition and Bond for.....	16
Order of .....	27
Petition for .....	20
Reply .....	91
Reply, Amended .....	99

<b>Index</b>	<b>Page</b>
Statement of Points on Which Appellant Intends to Rely on Appeal (Circuit Court of Appeals) .....	344
Statement of Points on Which Appellant Intends to Rely on Appeal (District Court).....	336
Stipulation and Order Regarding Bond on Appeal, etc. ....	329
Stipulation for Trial Without Jury, etc.....	115
Summons .....	14
Testimony .....	116
Exhibits for defendant:	
1—Notice of sale under chattel mortgage foreclosure .....	155
2—Note dated December 27, 1933 in the sum of \$17,000 payable to Regional Agricultural Credit Corporation of Spokane, Washington signed by Simon Douglas.....	162
3—Chattel mortgage dated December 27, 1933 by Simon Douglas to Regional Agricultural Credit Corporation .....	163
4—Telegram dated January 22, 1935 to Mrs. Dorothy Worthington from Regional Agricultural Credit Corporation .....	178

Index	Page
5—Telegram dated January 23, 1935 to H. H. Piggott from Max Worth- ington .....	180
6—Letters addressed to various pros- pective purchasers of the livestock at the Simon Douglas Ranch.....	190
7—Tally sheets .....	233
8—Power of attorney of Simon Doug- las to W. E. Robinson.....	246
9—Application for renewal of chattel mortgage .....	243
Witnesses for defendant:	
Balch, R. I.	
—direct .....	283
—cross .....	286
—redirect .....	287
Cameron, John G.	
—direct .....	278
—cross .....	281
Cooper, Ed. C.	
—direct .....	230
—cross .....	239
Jefferson, Ben	
—direct .....	225
—cross .....	227
—redirect .....	229

Index	Page
Witnesses for defendant (cont.):	
Johnson, Daley	
—direct .....	271
—cross .....	273
—redirect .....	274
—recross .....	276
Mather, Verne	
—direct .....	188
Pigott, H. H.	
—direct .....	174
—cross .....	181
—redirect .....	183
Ragan, William	
—direct .....	267
—cross .....	269
—redirect .....	270
Robinson, J. A.	
—direct .....	205
—cross .....	219
—redirect .....	224
Robinson, W. E.	
—direct .....	239
—cross .....	257
—redirect .....	265
Wildschultz, M. W.	
—direct .....	276
Worthington, Max	
—direct .....	184
—cross .....	185

Index	Page
Witnesses for plaintiff:	
Birkinbine, Frank	
—direct .....	134
—cross .....	138
Clement, Hal	
—direct .....	118
—cross .....	122
—redirect .....	123
King, Joe C.	
—direct .....	140
—cross .....	144
—redirect .....	151
—recross .....	152
—redirect .....	153
Yeager, George	
—direct .....	124
—cross .....	127
—redirect .....	134
Transcript of Evidence and Proceedings at Trial (See “Testimony”).....	116





NAMES AND ADDRESSES OF ATTORNEYS:

Mr. RAYMOND E. DOCKERY,  
Lewistown, Montana.

Messrs. BELDEN & DE KALB,  
Lewistown, Montana.  
For Plaintiff and Appellee.

Mr. J. R. WINE,  
Helena, Montana.

Mr. W. Q. VAN COTT,  
1311 Walker Bank Bldg.,  
Salt Lake City, Utah.

Mr. D. EUGENE LIVINGSTON,  
Continental Bank Bldg.,  
Salt Lake City, Utah.  
For Defendant and Appellant. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana.—Great Falls Division.

No. 1237.

E. B. CHAPMAN, as Administrator of the ESTATE of SIMON T. DOUGLAS, deceased,  
Plaintiff,

vs.

REGIONAL AGRICULTURAL CREDIT CORPORATION OF SPOKANE, WASHINGTON, a corporation,

Defendant.

Be It Remembered, that on July 10, 1935, a Transcript on Removal from the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, was duly filed herein, the Complaint contained in said Transcript being in the words and figures following, to-wit: [2]

In the District Court of the Tenth Judicial District  
of the State of Montana, in and for the County  
of Fergus.

E. B. CHAPMAN, as Administrator of the Estate  
of Simon T. Douglas, deceased,

Plaintiff,

vs.

REGIONAL AGRICULTURAL CREDIT COR-  
PORATION OF SPOKANE, WASHING-  
TON, a corporation,

Defendant.

### COMPLAINT

Comes Now the Plaintiff and for Cause of Ac-  
tion Against the Defendant, Complains and Alleges:

#### I

That one, Simon T. Douglas died intestate in  
Fergus County, Montana, on or about the 12th day  
of January, 1935, being at the time of his death a  
resident of said County, and leaving an estate in  
said County of Fergus, being at the time of his  
death, and at all times herein mentioned, the owner  
of and in possession of all of the personal property  
hereinafter mentioned, described and referred to;  
that thereafter on the 23rd day of March, 1935, the  
Plaintiff herein filed his petition in the above enti-  
tled Court for Letters of Administration of the es-  
tate of the said Simon T. Douglas, deceased, and  
that thereafter such proceedings were had and taken

in said matter, that by an order duly made and given on the 4th day of April, 1935, the Plaintiff herein was by order of Court, duly appointed Administrator of the Estate of Simon T. Douglas, deceased, and Letters of Administration ordered issued to him upon his taking the oath and filing a bond as required by law and the order of the Court; that thereafter this Plaintiff did file a bond as required by the order appointing him administrator, which bond was approved by the Court, and did take the oath of administration as required by law, and Letters of Administration were thereupon issued to the Plaintiff herein on the 9th day of April, 1935; that the Plaintiff herein is now and has been ever since the 9th day of April, 1935, the duly [3] and regularly appointed, qualified and acting administrator of the estate of Simon T. Douglas, deceased.

## II

That during his life time, to-wit on the 27th day of December, 1933, the said Simon T. Douglas, now deceased, made, executed and delivered a certain chattel mortgage, in favor of the Defendant herein to secure the payment to the Defendant of \$17,000.00, covering 505 head of sheep of various ages and sex, 12 head of work horses, 10 head of saddle horses, 290 ton of hay, wool and other incidental property, and equipment described therein, the indebtedness secured being due and payable December 15, 1934, after date, which chattel mortgage was duly and regularly filed in the office of the County

Clerk and Recorder of Fergus County, Montana, on the 8th day of January, 1934, at 4:55 o'clock P. M., of said day, and remains as a record thereof, a copy of which said chattel mortgage is hereunto attached, marked Exhibit "A", and by reference thereto, made a part hereof;

That on or about the 14th day of December, 1934, during his life time, the said Simon T. Douglas, made, executed and delivered to the Defendant herein his further certain chattel mortgage to secure the payment of \$19,270.00, covering 5675 head of sheep, of various ages and sex, 3 cows, 22 head of horses, all hay, wool and unsold 1934 wool and other incidental property and equipment described therein, the indebtedness so secured by the same being due and payable July 1, 1935, after date, which chattel mortgage was duly and regularly filed in the office of the County Clerk and Recorder of Fergus County, Montana, on the 28th day of December, 1934, at 4:00 o'clock P. M., of said day, and is still a record thereof, a copy of which said chattel mortgage is hereunto attached, marked Exhibit "B", and by reference thereto made a part hereof; the last described mortgage contained a provision as follows, to-wit:

"The indebtedness secured hereby, or part thereof, is a renewal and continuation of the indebtedness secured by the mortgage, or mortgages, in the office of the above county, or counties."

and Plaintiff is informed and believes and so alleges that both of said mortgages were given in connection with the same indebted- [4] ness and purported to cover the same proportions of the same property and its increase, which indebtedness and property increased and decreased during the existence of said mortgages, because of advances made, natural increase, sale of property and application of proceeds.

### III

That immediately after the death of said Simon T. Douglas, deceased, the said mortgagee, the defendant herein, by and through its officers and agents, went to the place where Simon T. Douglas lived and where he had been keeping the mortgaged property and took possession of certain of the property covered by the said mortgage, hereinafter more particularly described, and on or about the 28th day of January, 1935, with full knowledge on the part of the Defendant and its agents and officers of the death of Simon T. Douglas, and that no administrator or executor had been appointed, or letters of administration or testamentary granted in the matter of his estate, posted notices of sale of the property covered by said mortgage, being designated as "Notice of Sale under Chattel Mortgage", a copy of which said notice is hereunto attached, marked Exhibit "C", and by reference thereto, made a part hereof, the said notice fixing the 5th day of February, 1935, as the date upon which said property was to be sold.



## IV

That on the 5th day of February, 1935, at the time and place designated in said notice, the said mortgagee, by and through its officers and agents did hold a public sale of the said mortgaged property, then in mortgagee's possession, under the provisions of said mortgage, and did wrongfully sell, alienate and permanently dispose of, by delivery to various purchasers, all of the property of the deceased, then in their possession, covered by said chattel mortgage, prior to the appointment of an administrator in his estate and the granting of any letters testamentary or of administration; that said property, as aforesaid, then and there in possession of the Defendant, as mortgagee, and so wrongfully sold and alienated [5] by said mortgagee, is specifically described as follows, to-wit:

- 1453 1934 ewe lambs and a few wethers
- 1080 old ewes
- 1273 two, three, four and five year old ewes
- 21 head of horses
- 308 sacks of molasses cake
- 236 rams, bucks and old bucks
- 36 tons of hay
- 800 bushel of oats
- 90 tons of oat hay

All wagons, trucks, automobiles, camp outfits, saddles, harnesses, mowers, hay racks, stackers, loaders, and all and similar ranch or farm machinery, which were all gathered together and sold as one

item. The sale of said property being shown by that said mortgagee's return of sale, a copy of which is hereunto attached, marked Exhibit "D", and by reference thereto, made a part hereof, which return is attached to the chattel mortgage, hereunto attached, marked Exhibit "A".

## V

That on the date of said sale the amount due Defendant on said mortgage indebtedness was the sum of \$16,788.92, and that the gross proceeds of said sale amounted to the sum of \$15,000.92.

## VI

That at the time of taking possession of said property, so sold, by the mortgagee, and at the time of the sale thereof, there was sufficient pasture available and sufficient hay and *fee* on hand and protection available, for the proper protection and keeping of the livestock covered by said mortgage for several months, and equipment and other property was secure, and there was no necessity whatsoever for an immediate sale of said property, the reasonable market value thereof exceeding greatly the amount then due and owing, or to become due and owing to said mortgagee.

## VII

That said sale was so poorly and hurriedly organized and so negligently and poorly handled, and the property so grouped and offered for sale in lots



of such size, as to preclude bids from ordinary prospective purchasers with the result that the reasonable value of said property was not received from purchasers at said sale, and said property was sold and alienated for a consideration far below the reasonable value thereof to damage [6] of the Plaintiff and the estate he represents, as hereinafter set out.

### VIII

That Plaintiff is informed and believes and so alleges that the said mortgagee failed to account for all of the property sold and disposed of by it at said sale.

### IX

That at the time of said sale and prior to the holding thereof the attention of the Defendant and of its officers and agents was directly called by persons interested in the estate of the Mortgagor to the fact that no letters of administration or testamentary had been issued in the estate of the deceased mortgagor, and that under the law of the State of Montana, as hereinafter set out their action in so disposing of said property was unlawful and that the Defendant would be liable to damages of double the value of the property disposed of and alienated through said sale to the estate of said mortgagor, and protest of said sale was then and there made and given to the Defendant, its agents and officers. That said Defendant and its officers and agents, with full notice and knowledge of the facts and law as

above set out, did ignore the facts and law and did knowingly, wilfully and wrongfully proceed with such sale as aforesaid and did wrongfully dispose of and alienate the property of said estate prior to the issuance of Letters of Administration or testamentary to the damage of the Plaintiff and the estate he represents as hereinafter set out.

## X

That the value of the property of the deceased, so wrongfully sold and alienated before the granting of Letters testamentary or of administration, as aforesaid, at the date of said sale of said property, was as follows, to-wit:

That said 1453, 1934 ewe lambs were of  
the value at the time when sold at  
\$6.00 per head, or of a value of.....\$ 8718.00

That the 1080 head of old ewes were  
reasonably worth \$5.00 per head, or  
of a value of..... 5400.00

That the 1273 head of two, three, four  
and five year old ewes, were reason-  
ably worth \$7.00 per head, or of a  
value of ..... 8911.00

That said 21 head of horses were of  
the reasonable value of..... 1200.00

[7]

That said 308 sacks of molasses cake  
were reasonably worth the sum of  
\$2.40 per sack, or of a value of..... 739.20

That said 236 head of rams, bucks and old bucks, were reasonably worth the sum of .....	1930.00
That said 46 tons of hay was reasonably worth the sum of \$15.00 per ton, or a value of.....	690.00
That said 800 bushel of oats were reasonably worth the sum of \$1.50 per cwt. or a value of.....	12.00
That said 90 ton of oat hay was reasonably worth the sum of \$10.00 per ton, or a total of.....	900.00
That the wagons, trucks, automobiles, camp outfits, saddles, harnesses, mowers, hay racks, stackers, loaders and other similar ranch or farm machinery, which were lumped and sold as one item, were reasonably worth the sum of.....	3000.00
Total.....	\$31500.20

## XI

That in conducting the sale of said property as aforesaid, the Defendant herein did deliver possession of the property purchased to the purchasers, and that said property was thereupon or immediately thereafter removed from the premises by the said purchasers, resold by them and handled in such a manner that it is impossible for the Plaintiff to locate or recover any of said property, and that

none of said property was purchased by or retained by the Defendant mortgagee and the same and the whole thereof has been totally lost to the Plaintiff herein in the estate which he represents.

## XII

That under the provisions of Section 10140 of the Revised Codes of the State of Montana, 1921, it is provided that,

“If any person before the granting of Letters testamentary or of administration embezzles or alienates any of the money, goods, chattels or effects of a decedent, he is charged therewith and liable to an action by an executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.”

and Plaintiff alleges that before the granting of letters testamentary or of administration in the estate of said Simon T. Douglas, deceased, the Defendant, the Regional Agricultural Credit Corporation of Spokane, Washington, did by its action, as aforesaid, wrongfully alienate the goods, chattels, and effects of the decedent, Simon T. Douglas, as aforesaid, and hereinbefore set out, in such a way as to preclude recovery thereof by the Plaintiff, all against [8] the form of the Statute in such case made and provided; and that by reason of its action in so doing, it is liable and has become indebted to the Plaintiff herein as the Administrator of said

Estate, who brings this action for the benefit of the said estate in double the value of the property so wrongfully alienated, as aforesaid, and by reason of the above and foregoing, is indebted to the Plaintiff herein for the benefit of said estate in the sum of \$63,000.40, less any amount legitimately owed by the said decedent at the time of his death to said defendant, which said amount was fixed by the defendant its self at the time of sale, as the sum of \$16,788.92, which deducted from the value of said property, as aforesaid, leaves said defendant owing this Plaintiff for the benefit of said estate the sum of \$46,211.48, with interest thereon at legal rate from the 5th day of February, 1935.

Wherefore, Plaintiff demands judgment against the Defendant, as follows:

1st: For the benefit of the estate which the Plaintiff represents in the sum of \$46,211.48, being double the value of the property of the estate of the Plaintiff alienated by the Defendant less the amount owed the Defendant at the time of the wrongful alienation thereof.

2nd: For Plaintiff's costs in this behalf expended and incurred.

RAYMOND E. DOCKERY

Attorney for the Plaintiff



State of Montana,  
County of Fergus—ss.

E. B. Chapman, being first duly sworn, deposes and says:

That he is the Plaintiff in the above entitled action; that he has read the above and foregoing Complaint and knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge, information and belief, and as to those matters he believes it to be true.

E. B. CHAPMAN

Subscribed and sworn to before me this 23rd day of May, 1935.

GUY M. BRISLAWN

Notary Public for the State of Montana. Residing  
at Lewistown, Montana. My commission expires  
April 24, 1936.

(Seal)

[Endorsed]: Filed July 10-1935. C. R. Garlow,  
Clerk. [9]

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That said Transcript on Removal contained a  
Summons, which is in the words and figures fol-  
lowing, towit: [10]

[Title of State District Court and Cause.]

### SUMMONS.

The State of Montana sends greetings to the  
above-named Defendant:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this Summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness my hand and the seal of said Court, this 24th day of May, 1935.

MINNIE R. RITCH,  
Clerk

By F. A. CURTES,  
Deputy Clerk

## SHERIFF'S RETURN.

State of Montana,  
County of Lewis and Clark—ss.

### Office of The Sheriff.

I hereby certify, that I received the annexed summons on the 27th day of May, 1935, and personally served the same on the 28th day of May A. D. 1935, upon the defendant Regional Agricultural Credit Corporation of Spokane, Washington, a corporation, by delivering to H. W. Dickey, Assistant Manager of the Helena Branch of said Regional Agricultural Credit Corporation of Spokane, Washington,

a corporation, personally in the County of Lewis and Clark a true and correct copy of said summons together with a copy of the complaint upon which said summons issued at the same time showing him, the annexed summons and informing him of the contents thereof.

Dated at Helena, Montana, this 28th day of May  
A. D. 1935.

BRIAN D. O'CONNELL,  
Sheriff.

By JOE SPURGEON,  
Deputy Sheriff.

Service      \$1.00

Copy

Mileage      \$ .34

---

Total      \$1.34

[Endorsed]: Filed July 10-1935. C. R. Garlow,  
Clerk. [11]

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That said Transcript on Removal contained a Notice of Petition and Bond for Removal, which is in the words and figures following, to wit: [12]

[Title of State District Court and Cause.]

#### NOTICE.

To the above named Plaintiff and to Raymond E. Dockery, Esq., Attorney for Plaintiff:

Please take notice that the above named defendant, Regional Agricultural Credit Corporation of



Spokane, Washington, a corporation, will on the 14th day of June, A. D. 1935, file in the District Court of the tenth judicial district of the State of Montana in and for the County of Fergus, in which said suit is now pending, its petition and bond for the removal of said cause from said court to the District Court of the United States in and for the District of Montana, and at the same time or as soon thereafter as counsel can be heard, will request the approval of the said bond and move the court to enter an order moving the above entitled cause to said District Court of the United States in and for the District of Montana.

Dated this 8th day of June, 1935.

J. R. WINE,  
Attorney for Defendant,  
Helena, Montana.

Served by mail June 10-1935.

[Endorsed]: Filed July 10-1935. C. R. Garlow,  
Clerk. [13]

---

That said Transcript on Removal contained an Affidavit of Service of Petition for Removal and Bond for Removal, which is in the words and figures following, to wit: [14]

In the District Court of the Tenth Judicial District  
of the State of Montana, in and for the County  
of Fergus.

E. B. CHAPMAN, as Administrator of the Estate  
of Simon P. Douglas, Deceased,  
Plaintiff.

vs.

REGIONAL AGRICULTURAL CREDIT COR-  
PORATION OF SPOKANE, WASHING-  
TON, a Corporation,  
Defendant.

AFFIDAVIT OF SERVICE OF PETITION  
FOR REMOVAL, AND BOND AND DE-  
MURRER.

State of Montana,  
County of Fergus—ss.

J. A. Robinson, being first duly sworn, deposes  
and says:

That he is a white male citizen of the United  
States and over the age of twenty-one years, and  
resides at Helena, Lewis & Clark County, Montana.

That on the 14th day of June, 1935, at the hour  
of about eleven o'clock A. M. of said day, in the  
City of Lewistown, Fergus County, Montana, at the  
office of Raymond E. Dockery, Attorney for Plain-  
tiff herein, he did personally at that time and place  
serve upon the said Raymond E. Dockery, Attorney

for Plaintiff herein, a true and correct copy of the Petition for Removal, a true and correct copy of the Bond for Removal to United States District Court, for the District of Montana, and a true and correct copy of the Demurrer filed in the above-entitled action on behalf of the defendant, by delivering to the said Raymond E. Dockery true and correct copies of the Petition for Removal, of the Bond, and of the Demurrer.

J. A. ROBINSON

Subscribed and sworn to before me this 14th day of June, A. D. 1935.

H. B. GIBSON

Notary Public for the State of Montana. Residing at Lewistown. My Commission expires June 18th, 1937.

(Notarial Seal)

[Endorsed]: Filed June 14th, A. D. 1935.

[Endorsed]: Filed July 10, 1935. C. R. Garlow, Clerk. [15]

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That said Transcript on Removal contained a Petition for Removal, which is in the words and figures following, to wit: [16]

[Title of State District Court and Cause.]

PETITION FOR REMOVAL.

To the Honorable District Court of the Tenth Judicial District of the State of Montana in and for the County of Fergus and to the Honorable Stewart McConochie, Judge thereof:

Now comes the above named defendant, Regional Agricultural Credit Corporation of Spokane, Washington, a corporation, limiting its appearance herein for the purpose of filing this petition and not admitting the jurisdiction of the court over it and appearing for no other purpose whatever, files this its petition for the removal of this case and cause, and of the whole thereof, from the aforementioned District Court in which it is now pending, to the District Court of the United States in and for the District of Montana, Great Falls Division, said District and State, and your petitioner shows unto the Court;

That it is the defendant in the above entitled suit;

That the matter and amount in dispute in said suit exceeds, exclusive of interest and costs the sum or value of \$3,000.00;

That the said suit is of a civil nature at common law of which the District Court of the United States had original jurisdiction;

That said suit has been brought and is now pending in this court and has not yet been tried, nor has the time within which this defendant, your petitioner, is required by the laws of [17] the State of

Montana, or any rule of this Honorable Court, to answer or plead to the complaint of the plaintiff, elapsed;

That your petitioner, Regional Agricultural Credit Corporation of Spokane, Washington, is now, and at all times herein mentioned, has been a corporation organized and created under an Act of Congress, to-wit: the Act of January 22nd 1932 and Amendments thereto;

That the Government of the United States is now and, at all times since the organization and creation of petitioner as a corporation, has been the owner of more than one-half of the capital stock of said Regional Agricultural Credit Corporation of Spokane, Washington, petitioner herein, said Government of the United States being now and at all said times the owner of all of the capital stock of said petitioner;

That the aforementioned suit is of a civil nature at law and arises under the Constitution and laws of the United States, in that said case involves a Federal question; that is, whether or not plaintiff can establish a claim for alleged damages for an alleged conversion of personal property against your petitioner, which is now and, at all times herein mentioned, has been a corporation organized and created by Act of Congress as hereinbefore set out.

Wherefore, your petitioner prays that this Court will proceed no further herein except to make an order of removal of this action to said District Court of the United States and to accept said bond



and cause the record herein to be removed to the said District Court of the United States.

**REGIONAL AGRICULTURAL  
CREDIT CORPORATION OF  
SPOKANE, WASHINGTON**

By J. R. WINE

Its Attorney [18]

State of Montana,  
County of Lewis and Clark—ss.

O. E. Bourck, being duly sworn, deposes and says that he is an officer of Regional Agricultural Credit Corporation of Spokane, Washington, the above named defendant and petitioner herein, to-wit: its Assistant Secretary; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

The reason this verification is made by deponent and not by defendant is because defendant is a corporation, of which deponent is an officer, to-wit the Assistant Secretary thereof.

**O. E. BOURCK**

Subscribed and sworn to before me this 12th day of June, 1935.

(Seal)

**A. E. REDINGTON**

Notary Public for the State of Montana, residing at Helena, Montana. My commission expires October 18, 1935.

Service of the foregoing Petition, and the bond therein referred to, made and admitted and receipt of a true copy of each thereof acknowledged this ..... day of June, 1935.

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Attorney for Plaintiff.

[Endorsed]: Filed July 10, 1935. C. R. Garlow, Clerk. [19]

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That said Transcript on Removal contained a Bond on Removal, which is in the words and figures following, to wit: [20]

[Title of State District Court and Cause.]

BOND ON REMOVAL.

Know All Men by These Presents:

That Regional Agricultural Credit Corporation of Spokane, Washington, a corporation organized and existing under and by virtue of the laws of the United States of America, as principal, and United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and qualified to do business, and doing business, in the State of Montana, and having authority to transact business therein, as surety, are held and firmly bound unto E. B. Chapman, as Administrator of the Estate of Simon T. Douglas, deceased, plaintiff in the above

entitled cause, his heirs, successors and assigns, in the penal sum of Five Hundred Dollars, lawful money of the United States of America, for the payment of which sum well and truly to be made the undersigned obligors bind themselves, their successors and assigns jointly and severally, firmly by these presents.

The conditions of this obligation are such that whereas the said defendant, Regional Agricultural Credit Corporation of Spokane, Washington, has applied to the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, for the removal of a certain case therein pending, wherein the said E. B. Chapman, as Administrator of the Estate of Simon T. Douglas, deceased, is plaintiff and said Regional Agricultural Credit Corporation of Spokane, Washington, is defendant, to the District Court [21] of the United States for the District of Montana, Great Falls Division, for further proceedings on the grounds in said petition set forth, and that all further proceedings in this action in the said Court be stayed;

Now, if said Regional Agricultural Credit Corporation of Spokane, Washington, shall within thirty days from the day of filing of said petition for removal enter in the said District Court of the United States a certified copy of the record in said cause and shall well and truly pay all the costs that may be awarded by said District Court of the United



States, in and for the District of Montana, if said Court shall hold that said cause was wrongfully or improperly removed thereto, then the obligation shall be void; otherwise to remain in full force and effect.

In witness whereof said above named corporations have caused their respective corporate names to be hereunto subscribed by their respective officers and caused their respective corporate seals to be hereunto affixed this 12th day of June, 1935.

REGIONAL AGRICULTURAL  
CREDIT CORPORATION OF  
SPOKANE, WASHINGTON

By O. E. BOURCK

Assistant Secretary

UNITED STATES FIDELITY  
AND GUARANTY COMPANY

By L. K. ALBRECHT,

Attorney in Fact.

(Seal)

Approved and accepted this 15th day of June,  
1935.

STEWART McCONOCHIE  
Judge

[Endorsed]: Filed July 10, 1935. C. R. Garlow,  
Clerk. [22]

in form and substance and that the surety thereon is likewise sufficient; and the Court being fully advised in the premises;

It is Therefore Ordered that the above entitled cause be, and the same is, hereby removed to the District Court of the United States in and for the District of Montana, Great Falls Division, pursuant to the Statutes of the United States, and that all other proceedings of this Court be stayed.

Dated this 15th day of June, 1935.

STEWART McCONOCHIE,  
Judge.

[Endorsed]: Filed July 10, 1935, C. R. Garlow,  
Clerk. [27]

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That said Transcript on Removal contained Clerk's Certificate to Transcript on Removal, which is in the words and figures as follows, towit: [28]

[Title of State District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT.

State of Montana,  
County of Fergus—ss.

I, Minnie R. Ritch, Clerk of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, Do Hereby Certify, That the foregoing transcript, consisting of 37 pages, contains and sets forth full, true, correct

and compared copies of all papers on file in my office in an action in the District Court entitled: "E. B. Chapman, as Administrator of the Estate of Simon T. Douglas, deceased, Plaintiff, vs. Regional Agricultural Credit Corporation of Spokane, Washington, a corporation, Defendant", which is designated in the records of my office as Cause No. 16947.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, at Lewistown, Montana, this 8th day of July, 1935.

(Seal) MINNIE R. RITCH,

Clerk of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus. [29]

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I, Stewart McConochie, Judge of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, do hereby certify that Minnie R. Ritch was, at the date of the foregoing certificate, and now is, Clerk of said Tenth Judicial District, in and for the County of Fergus, State of Montana, and that said Clerk is the officer in whose custody the files of the above-entitled action are required to be kept by the laws of the State of Montana, and authorized by the laws of the State of Montana to certify as aforesaid, and that

said attestation to said copies of said papers is in due form of law.

Dated at Lewistown, Montana, this 8th day of July, 1935.

STEWART McCONOCHIE,

Judge of the Tenth Judicial District Court of the State of Montana, in and for the County of Fergus.

I, Minnie R. Ritch, Clerk of the Tenth Judicial District Court of the State of Montana, in and for the County of Fergus, Do Hereby Certify, that Stewart McConochie was, at the date of the foregoing certificate, the duly appointed, qualified and acting Judge of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Lewistown, Montana, this 8th day of July, 1935.

(Seal)

MINNIE R. RITCH,

Clerk of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus.

[Endorsed]: Filed July 10, 1935. C. R. Garlow, Clerk. [30]

Thereafter, on August 8, 1935, an Amended Demurrer was duly filed herein, being in the words and figures following, towit: [31]

In the District Court of the United States,  
in and for the District of Montana.  
Great Falls Division.

E. B. CHAPMAN, as Administrator of the Estate  
of Simon T. Douglas, deceased,  
Plaintiff,

vs.

REGIONAL AGRICULTURAL CREDIT COR-  
PORATION OF SPOKANE, WASHING-  
TON, a corporation,  
Defendant.

### AMENDED DEMURRER.

Comes now the above named defendant and within thirty (30) days after filing the transcript on removal in the above entitled action in the office of the Clerk of the above entitled Court, files this, its amended demurrer to the complaint of the plaintiff herein upon the grounds and for the reasons following, towit:

#### I.

That said complaint does not state facts sufficient to constitute a cause of action.

#### II.

That said complaint is ambiguous, unintelligible and uncertain in the following particulars, towit:

(a) That it is alleged in Paragraph VII of said complaint "That said sale was so poorly and hurriedly organized, and so negligently and poorly handled, and the property so grouped and offered for sale in lots of such size" as to preclude bids from ordinary prospective purchasers, and defendant is not informed by such allegation, nor can it understand, or intelligently answer such allegation, in that no fact or facts is or are alleged, but the conclusions ONLY of the plaintiff are stated.

(b) That it is alleged in Paragraph VIII of said complaint that the mortgagee (this defendant) "Failed to account for all of the property sold and disposed of by it at said sale"; that defendant cannot understand nor is it advised by such allegation what items of personal property it failed to account for from such mortgage foreclosure sale.

(c) That it is alleged in said complaint that the deceased, Simon T. Douglas, made, executed and delivered certain chattel mortgages on personal property owned by him during his lifetime to [32] secure the payment of a certain indebtedness owing by him to the defendant; that thereafter the defendant pursuant to the power of sale contained in said respective chattel mortgages posted notices of sale for the length of time required by law and sold said property to satisfy said mortgages pursuant to the Statutes of the State of Montana and the terms of said respective chattel mortgages; that such sale is the only sale mentioned or referred to in said complaint and from the allegations of



said complaint and the Exhibits attached thereto it appears that said sale was fair and regular on the face thereof; that notwithstanding such fair and regular sale pursuant to law and said respective chattel mortgages it is alleged in Paragraph IX of said complaint that the defendant "did wrongfully dispose of and alienate the property of said estate prior to the issuance of letters of administration or testamentary to the damage of the plaintiff and the estate he represents"; and in Paragraph XI of said complaint it is alleged that the purchasers at such mortgage foreclosure sale removed said personal property and resold it so that it was impossible for the plaintiff to locate or recover any of said property; and in Paragraph XII plaintiff set out a copy of Section 10140 Revised Codes of Montana, 1921, and follows the same by various conclusions of the plaintiff to the effect that the defendant wrongfully alienated the goods, chattels and effects of decedent, Simon T. Douglas, and that by reason of such mortgage foreclosure sale defendant is liable and has become indebted to the plaintiff administrator in double the value of the property so disposed of.

That such allegations are inconsistent and that the one destroys the other in this, to wit: That if such sale were made pursuant to law and the terms of such chattel mortgages no facts are alleged on which the plaintiff may properly, or at all, predicate the conclusion that the defendant wrongfully,



or otherwise, alienated the property of said decedent, Simon T. Douglas, but on the contrary it affirmatively appears from said complaint that said defendant proceeded according to law and the terms of said chattel mortgages, and it did not violate or transgress any legal right of the said plaintiff or said plaintiff's intestate.

J. R. WINE,

Attorney for Defendant.

[Endorsed]: Filed August 8, 1935. C. R. Garlow, Clerk. By C. G. Kegel, Deputy. [33]

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[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of Montana,

County of Lewis and Clark—ss.

J. R. Wine, being first duly sworn, deposes and says:

That he is an attorney at law and is the attorney of record for the above named defendant in the above entitled action, and that he resides and maintains his office in the City of Helena, in the County of Lewis and Clark, State of Montana; that Raymond E. Dockery is the attorney of record for the above named plaintiff in said cause and resides and has his office at Lewistown, in the County of Fergus, in said State of Montana; that in each of said two

places there is a United States post office and between said two places there is a regular daily communication by mail; that on the sixth day of August, A. D. 1935, deponent served a true copy of defendant's Amended Demurrer in the above entitled action herein on said Raymond E. Dockery, the said attorney for said plaintiff, by depositing a copy of said Amended Demurrer on said August 6th, 1935 in the post office at said City of Helena, County of Lewis and Clark, State of Montana, aforesaid, properly enclosed in a franked envelope, not requiring postage, and addressed to Raymond E. Dockery, Attorney at Law, Lewistown, Montana, the place of his said residence and office.

J. R. WINE

Subscribed and sworn to before me this 6th day of August, 1935.

(Seal) MYLES J. THOMAS,

Notary Public for the State of Montana. Residing  
at Helena, Montana. My commission expires  
Oct. 16, 1937. [34]

(Order indorsed on back cover of Amended  
Demurrer)

The within demurrer came on regularly for hearing under Rule 40 (2) of the rules of this Court, and, having been duly considered, and the court being advised, and good cause appearing therefor, the said demurrer is hereby sustained as to both

paragraphs thereof; with leave to amend within ten days from receipt of notice hereof.

CHARLES N. PRAY,  
Judge.

Nov. 18, 1935. [35]

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Thereafter, on September 27, 1935, a Brief was filed by plaintiff herein, on the Amended Demurrer, which Brief is in the words and figures following, towit: [36]

[Title of District Court and Cause.]

### BRIEF

The complaint in this case is predicated upon the provisions of Section 10140, Revised Codes of Montana for the year 1921, reading as follows:

“If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.”

The same code provision obtains in other states in full substance at least. In Oklahoma, the section seems to be identical as it appears in Section 1220,

Compiled Statutes of Oklahoma, 1921, as quoted in  
Secrest v. Wood, 224 Pac. 349;

The Oklahoma court in

Litz v. Exchange Bank of Alva, 15 Okla. 564,  
83 Pac. 790,

applying the statute, clearly indicates in the opinion  
that the complaint herein states a cause of action.

[37]

Likewise, the court in

Aultman and Taylor Machinery Company v.  
Fuss, 207 Pac. 308

further exemplifies the statute.

This is not a case where mere possession was taken under the chattel mortgage and the possession retained until an administrator or executor had been appointed and a sale thereafter held. Here, the complaint discloses that there was no administrator appointed and the property was seized and sold under such circumstances that the estate was seriously damaged.

We shall, in this opening brief, further justify the filing of the action. An extensive amended demurrer has been filed which needs argument at the hands of learned counsel for defendant. We shall endeavor to answer those arguments in a reply brief as soon as an answering brief has been served upon counsel for plaintiff.

We respectfully submit that the complaint states a cause of action and that defendant should be compelled to answer.

Respectfully submitted,

RAYMOND E. DOCKERY

BELDEN & DeKALB

Attorneys for Plaintiff

[Endorsed]: Filed Sept. 27, 1935. C. R. Garlow,  
Clerk. [38]

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Thereafter, on October 5, 1935, Defendant's Brief on Demurrer was duly filed herein, being in the words and figures following, towit: [39]

[Title of District Court and Cause.]

## DEFENDANT'S BRIEF ON DEMURRER

### 1.

#### Statement of the Case

Briefly, the following facts are to be gathered from the Complaint:

Simon T. Douglas died intestate January 12th 1935, leaving an estate in Fergus County, Montana; that after a lapse of more than two months and on the 4th day of April, 1935, plaintiff was appointed administrator, and letters were thereafter issued to him on the 9th day of April, 1935;

That the said Simon T. Douglas on December 27th 1933, duly executed a mortgage to the defendant in the amount of Seventeen Thousand (\$17,000.00) Dollars, covering certain personal property, which mortgage was duly and regularly filed in



Fergus County on the 8th day of January, 1934, a copy of which mortgage is attached to the Complaint, and thereafter and on the 14th day of December, 1934, said Douglas executed an additional mortgage in favor of the defendant in the principal sum of Nineteen Thousand Two Hundred Seventy (\$19,270.00) Dollars, covering certain personal property, therein described, and said mortgage was filed in Fergus County on the 28th day of December, 1934, and a copy of said mortgage is attached to the complaint;

It Is Further Alleged: That after the death of Douglas, the defendant went to his place and took possession of certain property covered by the said mortgage, and on the 28th day of January, 1935, and with full knowledge of the death of Douglas, and [40] that no administrator had been appointed, posted Notices of Sale of the property covered by the mortgage, a copy of which Notice is attached to the Complaint as Exhibit "C", and thereafter and on the 5th day of February, 1935, at the time and place designated in said Notice, defendant held "a public sale of the said mortgaged property, then in mortgagee's possession, under the provisions of said mortgage, and did wrongfully sell, alienate and permanently dispose of, by delivery to various purchasers, all of the property of the deceased, then in their possession, covered by said chattel mortgage, prior to the appointment of an administrator in his (decedent's) estate, and the granting of any letters testamentary or of administration", and



then follows a specific description of the property sold;

It Is Further Alleged; That the sale of said property is shown by said mortgagee's Return of Sale, "a copy of which is hereunto attached, marked Exhibit "D", and by reference thereto made a part hereof, which Return is attached to the chattel mortgage, hereunto attached, marked Exhibit 'A' ".

It Is Further Alleged: That on the date of said sale, the amount due to the defendant on its mortgage indebtedness by the decedent amounted to the sum of Sixteen Thousand Seven Hundred Eighty-eight and 92/100 (\$16,788.92) Dollars, and the gross proceeds of the mortgage sale amounted to the sum of Fifteen Thousand and 92/100 (\$15,000.92) Dollars;

It Is Further Alleged: That at the time of taking possession of the property, there was sufficient pasture available, and hay and feed for several months, and that the property was secure, and that there was no necessity for an immediate sale, and that the reasonable market value of said property greatly exceeded the amount due and owing defendant.

It Is Further Alleged: (Paragraph VII) "That said sale was so poorly and hurriedly organized and so negligently and poorly handled, and the property so grouped and offered for sale in lots [41] of such size, as to preclude bids from ordinary prospective purchasers with the result that the reasonable value of said property was not received from purchasers at said sale, and said property was sold and alien-

ated for a consideration far below the reasonable value thereof to damage of the plaintiff and the estate he represents, as hereinafter set out”.

It Is Further Alleged: (Paragraph VIII) “That plaintiff is informed and believes and so alleges that the said mortgagee failed to account for all of the property sold and disposed of by it at said sale”.

It Is Further Alleged: That persons interested in the estate of the mortgagor (without naming them or setting forth what their interest is) directed the attention of the defendant and its agents to the fact that no administrator had been appointed, and that a mortgage sale of said property was unlawful, and that defendant would be liable to damages, but that the defendant and its agents, with full notice and knowledge of the facts and law, ignored the same, and “did knowingly, wilfully and wrongfully proceed with said sale as aforesaid, and did wrongfully dispose of and alienate the property of said estate prior to the issuance of Letters of Administration or Testamentary to the damage of the plaintiff and the estate he represents as hereinafter set out”.

It Is Further Alleged: That the value of the property so sold is Thirty-one Thousand Five Hundred and 20/100 (\$31,500.20) Dollars, and that in conducting said sale the defendant delivered possession thereof to various purchasers, and said property was removed from the premises by them and re-sold, and that it is impossible for the plaintiff to locate or recover any of said property, and that none of

said property was purchased or retained by the defendant;

Plaintiff then sets out a copy of Section 10140 of the Revised Codes of Montana, 1921, and again alleges that before the granting of Letters of Administration, the defendant "did wrongfully alienate [42] the goods, chattels and effects of the decedent Douglas against" the form of statute in such case made and provided, and has become liable and indebted to the plaintiff as administrator in double the value of the property so sold in the sum of Sixty-three Thousand and 40/100 (\$63,000.40) Dollars, less the amount owing to the defendant, to-wit: Sixteen Thousand Seven Hundred Eighty-eight and 92/100 (\$16,788.92) Dollars, which "leaves said defendant owing this plaintiff for the benefit of said estate the sum of Forty-six Thousand Two Hundred Eleven and 48/100 (\$46,211.48) Dollars, with interest thereon at legal rate from the 5th day of February, 1935", and the Complaint concludes with a prayer for damages in such amount and for plaintiff's costs.

It appears from the copy of the mortgage, Exhibit "A", that the indebtedness therein mentioned matured on December 15th 1934, and prior to the death of the said Douglas, and it further appears from Exhibit "C", the Notice of Sale, that the foreclosure proceedings were under the prior or older chattel mortgage, and that the sale was held because default had occurred in the conditions of the chattel mortgage executed by Douglas, "by reason of the

failure of said mortgagor to pay the debt secured thereby”.

It further appears from Exhibit “D”, which is the Return of Sale, that the sale was conducted in all particulars in accordance with the statute relating to chattel mortgage sales, under power of sale contained therein.

In short, the case attempted to be presented is this: That during his life-time, the mortgagor executed a chattel mortgage to the defendant; that he defaulted in the payment of same prior to his death; that after his death and before the appointment of an administrator (a period of almost three months), the mortgagee pursuant to the contract of the mortgagor and the power of sale contained in the chattel mortgage, sold the security in accordance with the laws of Montana, and the subsequently appointed administrator now seeks to recover double damages under section 10140, R. C. M. 1921, [43] which provides that any person who, “before the granting of Letters of Administration embezzles or alienates any of the monies, goods, chattels or effects of a decedent” is charged therewith and liable to an action by the administrator of the estate for double the value of the property so embezzled or alienated. In support of said action, the plaintiff relies solely and exclusively upon the law of the State of Oklahoma. The case at bar is attempted to be based upon facts, all of which transpired in the State of Montana. The action is pending in a Court

in the District of Montana and it is respectfully submitted, governed by the laws of Montana.

To the Complaint of the plaintiff, the defendant filed an Amended Demurrer, both general and special. This Brief is submitted in support of such Amended Demurrer.

Defendant will present to the Court the following propositions:

1.

Section 10140, R.C.M. 1921, does not give a new right of action, nor create a remedy where one did not previously exist, but it merely increases the measure of damages.

2.

That the provisions of said Section 10140 do not apply to a case where the defendant acted in good faith under color of legal right, supposing he had a right to enforce a lien thereon, but that to subject a defendant to the penalty given by the statute, it should appear that he was an intermeddler and acted from wrong motives, or in bad faith.

3.

That by the great weight of authority, a power of sale vested in a mortgagee in a chattel mortgage is a power coupled with an interest which may be exercised by the donee of the power at any time, even after the death of the donor of the power. [44]

That as early as 1888, the Supreme Court of Montana announced the rule that a mortgagee has a lien upon the property mortgaged as security for his



debt, and that this lien will support a power of sale and so couple it with an interest, that it becomes a part of the security and irrevocable; again, in 1903, said court reiterated the rule that a power of sale, included in a mortgage, is a power coupled with an interest, and is a part of the security and irrevocable, and may be executed after the death of the mortgagor "without reference to the administration of the mortgagor's estate," and that such rule has been the law in Montana continuously since 1903, and is the law applicable to the case at bar.

## ARGUMENT.

### 1.

Section 10140, R.C.M., 1921, does not give a new right of action, nor create a remedy where one did not previously exist, but it merely increases the measure of damages:

"The statute does not give a new right of action, nor does it create a remedy which did not previously exist; it merely increases the measure of damages in case the tortious conversion has been committed at a particular time when the property was peculiarly exposed to loss—that is, the time intermediate the death of the deceased and the issuance of Letters of Administration",

2 Bancroft's Probate Practice, Sec. 485.

Levy v. Court, 105 Cal. 600, 29 L.R.A. 811.

Jahns v. Nolting, 29 Cal. 507.

Beckman v. McKay, 14 Cal. 250.



## 2.

The provisions of said Section 10140 do not apply to a case where the defendant acted in good faith, under color of legal right, in the enforcement of a lien on the property involved; in order to subject the defendant to the penalty given by the statute, it should appear that he was an intermeddler and acted from wrong motives or in bad faith. [45]

“To embezzle, as the term is employed in section 116, is to fraudulently appropriate to one’s own use, or conceal the effects of the estate which such person has in his possession; and to alienate, signifies to wrongfully transfer such property to another. Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law. An action of the nature of an action of trover may be brought by the administrator, without the aid of section 116, against any person who has embezzled or alienated the personal property of the estate, prior to the grant of administration; and that section does not give a new right of action, nor create a remedy where one did not previously exist, but it merely increases the measure of damages, in case the tortious conversion has been committed at a particular time when the property is peculiarly exposed to loss— that is, the time intermediate the death of the de-

ceased and the issuing of the letters of administration.”

Jahns v. Nolting, 29 Cal. 508

207 Pac. Rep. 309.

This rule has even been adopted in Oklahoma—*Aultman Company versus Fuss*, 207 Pacific 308.

The same rule is laid down by the Supreme Court of Oregon, in this language:

“But, however this may be, we are of the opinion that section 1152 does not apply to a case where the defendant acted in good faith under color of legal right, supposing he had title to the property or a right to enforce a lien thereon, though he should subsequently be unable to establish such title or right. The statute is highly penal in its consequences, and was evidently intended to punish those who might wrongfully or in bad faith interfere with, convert to their own use, or dispose of the property of a deceased person, by mulcting them in double damages; and its language should, we think, be so construed. To subject a defendant to the penalty given by the statute, it should appear that he was an intermeddler, and acted from wrong motives or in bad faith; otherwise, the executor or administrator should be satisfied with the ordinary remedies given him by law. *Roys v. Roys*, 13 Vt. 543; *Batchfelder v. Tenney*, 27 Vt. 578. It is not alleged, nor does it appear, that the defendants did not act in

the utmost good faith in attempting to foreclose their mortgage. They may have been ill advised, or may have mistaken their rights; but, until it is made to appear that they acted from wrongful motives or in bad faith, the plaintiff is not entitled to recover double damages from them."

Springer v. Jenkins, 84 Pac. 479 [46]

In Vermont, where the law is quite similar to our section 10140, in *Roys, Adm'r v. Roys*, 13 Vt. 543, the Court in discussing its effect said that it "should not be applied to a case" where one "acted in good faith, under color of legal right, supposing he had good title, though it might turn out otherwise. To subject the defendant to the penalty he must have acted from a wrong motive and mala fide."

In a still later case, in the same state, *Batchelder, Adm'r v. Tenney*, 27 Vt. 578, involving the same statute, it was also remarked that:

"We think to bring a case within this section of the statute, the act complained of must, at least, be done with the intent of wrongfully abstracting the property from the estate of the deceased, to the injury of its assets".

The Supreme Court of Wyoming, in a well-considered case, speaking of the double penalty statute of its state, similar to our Sec. 10140, says:

"We think it may fairly be deduced from the preponderance of authority that, in order

to be subjected to the liability imposed by Section 6830, *Supra*, the person who 'alienates' property of an estate must wrongfully transfer the same, acting in that respect from a wrongful motive and *mala fide*'".

*Delfelder v. Poston*, 293 Pac. 354-361.

Thus it will be seen that unless the plaintiff can show that the defendant was acting in bad faith or from wrongful motives, the provisions of Section 10140, above mentioned, do not apply. The plaintiff in the instant case has shown that the defendant, in the manner provided by law and pursuant to the power of sale, contained in its chattel mortgage, was proceeding in the ordinary manner to realize on the security given in support of an obligation that was past due. The defendant's actions were open and above board, public notice was given of the sale as required by statute, and a public sale was conducted and a return of said sale was made and filed according to law. Under these conditions it is respectfully [47] submitted that any claim or contention of wrongful conduct or bad faith is entirely eliminated, and under the circumstances appearing from the Complaint, it is utterly impossible to bring the defendant within the double penalty feature of Section 10140.

### 3.

A mortgagee's power of sale is coupled with an interest and it is not revoked by the death of the

mortgagor. This rule of law is sustained by the overwhelming weight of authority in the United States, inclusive of the State of Montana. In support of this contention, we respectfully direct the Court's attention to the Note appearing in Volume 56, A. L. R., at Page 224, and to the cases referred to in such Note. Attention is also directed to the Note appearing in Volume 64, A. L. R., at page 380. The first paragraph of this Note reads as follows:

“Ordinarily, a principal may revoke the power of his agent or attorney at any time, but a well-defined exception has been ingrafted on this general rule, to the effect that where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, unless there is an express stipulation that it shall be revocable, it is, from its very nature and character, in contemplation of the law, irrevocable, whether it is expressed to be so on the face of the instrument conferring the power, or not”.

This Note is supported with a large number of cases, in a large number of states, including:

Muth v. Goddard, 28 Mont. 237; 98 Am. St. Rep. 553.

First Natl. Bank v. Bell Min. Co., 8 Mont. 32.

See the case of Vaca v. Shavez (New Mexico), 252 Pac. 987.



The rule is stated in 3 Jones on Mortgages (Seventh Edition) as follows:

“Death of mortgagor.—As a general rule the death of the mortgagor does not revoke a power of sale, even though the mortgage is held merely to give a lien on the property. This being coupled with an interest in the estate, can not be revoked or suspended by the mortgagor. Of course, after his death the power can not be exercised in his name, but the authority to execute it in the name of the grantee continues. The execution of the [48] power is the grantee’s act by virtue of the power. It is not a mere power of attorney”.

(Sec. 1792)

In Volume 2 of Jones Chattel Mortgages and Conditional Sales (Bowers Edition), the rule is stated thus:

“The death of the mortgagor does not deprive the mortgagee of his remedy by foreclosure and sale, either in equity under a power of sale, or under a statute. He is not required to file his claim in the administration proceedings, but he may proceed to foreclose by notice and sale, just as he might have done had the mortgagor survived.”

(Sec. 788)

The article in Corpus Juris, entitled, “Chattel Mortgages”, sets forth the rule as follows:



“Duration of power. A power to sell contained in a mortgage is a power coupled with an interest and is irrevocable by the mortgagor, and neither he nor an equitable owner whom he represents may defeat the right of the mortgagees to foreclose by a sale under such power. The power to sell on default does not terminate with the expiration of the period of time for which the mortgage was given, and according to some authorities continues even after the death of the mortgagor.”

(11 C. J. 704, Sec. 502)

4.

In the case of First National Bank versus Bell Company, 8 Mont. 32, and rendered in the year 1888, it was held that a mortgagee has such an interest in the security mortgaged as will support a power of sale in the mortgage, and that such a power coupled with said interest becomes a part of the security and is irrevocable.

Again, in the year 1903, in the case of Muth v. Goddard, 28 Mont. 237, the Court adhered to the ruling announced in the First National Bank v. Bell case, *Supra*, and quoted, with approval, from Jones on Mortgages, the following:

“‘This being (a power) coupled with an interest in the estate cannot be revoked or suspended by the mortgagor. Of course, after his death the power cannot be exercised in his name, but the authority to execute it in the

name of the grantee continues.' And see cases cited: *Whitmore v. San Francisco Savings Union*, 50 Cal. 146; *More v. Calkins*, 95 Cal. 435, 30 Pac. 583, 29 Am. St. Rep. 128." [49]

The opinion further says:

"From the foregoing authorities, it clearly appears to us that the power of sale included in the trust deed in question is a power coupled with an interest."

In disposing of the proposition that the exercise of a power of sale, after the mortgagor's death, was inconsistent with the provisions of the probate law, the Court concludes its opinion with the following very pertinent language:

"It is argued, however, that foreclosing under a power of sale is inconsistent with our probate law, and that the mortgagee should enforce his rights either through the regular course of administration or by foreclosure in court. This argument cannot be maintained. 'The law may suspend its own process. As it gives the process, it may regulate it. But the deeds of trust and mortgages with the power of sale arise from the consent and agreement of parties, and there is no propriety in depriving creditors of the fruits of their foresight and caution.' (*Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234.) The Texas cases cited by plaintiffs are not in point. See *in re Horsfall's estate*, 20 Mont. 495, 52 Pac. 199. It follows that the trustee or his

successor in trust, having the legal title, could execute the power of sale (a power coupled with an interest) without reference to the administration of the mortgagor's estate, if he so elected."

### REGARDING PLAINTIFF'S BRIEF

Defendant desires to point out that the sole and only case relied upon by plaintiff, viz: *Litz v. Exchange Bank*, 83 Pac. 790, is of no help or value as an authority in passing on the Amended Demurrer. This is true: (1) because of the difference in the statutes in Oklahoma and Montana, dealing with the foreclosure of chattel mortgages, and (2) because the defendant herein was acting under a power of sale, irrevocable in the event of mortgagor's death, and no question as to an irrevocable power was presented or determined in the *Litz* case, *supra*.

Section 8257, R. C. M., 1921, provides as follows:

"A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security."

[50]

It is held that this applies to chattel mortgages. *Kinsman v. Stanhope*, 50 Mont. at page 48, Secs. 8286-87-88 Id., provide the procedure to be followed under a power of sale. If the mortgagor does not insert a power of sale in the chattel mortgage, an

action for foreclosure is the only remedy available to the mortgagor in Montana.

This is not the case in Oklahoma. The Oklahoma law in force in 1905, and prior thereto, provides as follows:

Sec. 3572. "A mortgagee of personal property, when the debt to secure which the mortgage was executed becomes due, may foreclose the mortgagor's right of redemption by a sale of the property, made in the manner and upon the notice prescribed by the article on pledge, or by proceedings under civil procedure;" etc.

Sec. 3573. "A chattel mortgage, when the conditions of the same have been broken, may be foreclosed by a sale of the property mortgaged, upon the notice, and in the manner following:

The notice shall contain:

1. The names of the mortgagor and mortgagee, and the assignor, if any;
2. The date of the mortgage;
3. The nature of the default and the amount claimed to be due thereon at the date of the notice.
4. A description of the mortgaged property, conforming substantially to that contained in the mortgage;
5. The time and place of sale;
6. The name of the party, agent or attorney, foreclosing such mortgage.

The notices must be posted in five places for ten days, and the mortgagee may become the purchaser.

Thus it will be seen that a mortgagee in Oklahoma has the option of proceeding in one of two ways to foreclose, without regard to any power of sale, contained in his mortgage. An examination of the Litz case (page 791—Col. 1) will disclose that the foreclosure in that case was not under a power of sale, but on the contrary was “by advertisements”. The Douglas sale, here in question, was pursuant to a “power”, and as hereinbefore pointed out, such power was not revoked by his death.

(Muth v. Goddard, *Supra*.)

In the Oklahoma case the foreclosure was conducted in the manner prescribed by statute, and the rights and liabilities of the [51] mortgagee depended exclusively upon the statute. Herein, an express power of sale, without any limitation was conferred upon the defendant; this power being coupled with an interest was not, and could not be revoked by death, insanity or bankruptcy, or as stated in the Muth case *Supra*, the Mortgagee “could execute the power of sale (a power coupled with an interest) without reference to the administration of the mortgagor’s estate, if he (it) so elected”. This language seems so pertinent and applicable, that nothing more remains to be said. Regardless of what the law in Oklahoma is, the Muth case settled it in Montana about thirty years ago, and so far as the writer hereof has been able to



ascertain, the rule in the Muth case has never been modified or reversed in any subsequent case in the Supreme Court of Montana.

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The special Demurrer is well founded. It attacks conclusions of law and inconsistent allegations of the complaint.

After alleging the action taken by defendant in foreclosing its chattel mortgage, the addition of such words as “knowingly” or “wilfully”, or “wrongfully” most certainly does not bolster up a pleading.

It would be impossible to prepare an intelligent answer to the portions of the pleading complained of.

Respectfully submitted,

J. R. WINE,

Attorney for Defendant.

[Endorsed]: Filed Oct. 5, 1935. C. R. Garlow,  
Clerk. [52]

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Thereafter, on October 17, 1935, Plaintiff's Reply Brief on Demurrer, was duly filed herein, being in the words and figures following, towit: [53]



[Title of District Court and Cause.]

PLAINTIFF'S REPLY BRIEF  
ON DEMURRER

Learned counsel for defendant, as we read and interpret his brief, bases his argument upon the following propositions:

I.

That since the power of sale provision of the chattel mortgage constitutes a power coupled with an interest, and under well-known rules such power is not revocable by death, that the defendant was authorized to proceed, notwithstanding the death of Douglas, to an exercise of the provisions of the power of sale.

II.

That decisions from other courts are not of value in as much as the Montana court has affirmed the validity of that contention. We think we can easily and clearly demonstrate to the court that these suggestions have no effect upon plaintiff's right. First then, let us consider the intent of the statute. It is beside the point to argue the question first as to whether it was a power of sale coupled with an interest and second, its general effect. We are not dealing with that question now. We are dealing with a prescribed period; during which time no one has the right to exercise any power such as is assumed to be granted by the provisions of the mortgage in the case at bar. The Oklahoma decisions were cited to the court because of a marked identity

of her statutory provision as found in [54] Section 10140. Oklahoma recognizes that such a provision is a power coupled with an interest, but has confined the exercise of that power to cases where an administrator or executor has been appointed.

*Western Newspaper Union vs. Thurmond*,  
111 Pac. 204;

The statute is directed to the act of "any person, before the granting of letters testamentary or of administration." Obviously, such a statute is designed to prevent the squandering of assets when there is no person in authority to protect.

The complaint shows, perhaps with more minute detail that it needs to show, the facts which render this sale under the circumstances particularly pernicious. If the doctrine announced in 2 Bancroft's Probate Practice, quoted on page 6 of the brief of opposing counsel is the doctrine which applies, then the allegations of the complaint clearly bring the plaintiff within the elements of that doctrine and make a valid *prima facie* cause of action. We need not now commit ourselves as to whether that is the applicable doctrine.

With these differentiations, we now proceed to a specific discussion of the facts:

First, learned counsel assumes that Oklahoma has a different doctrine than Montana and most of the other States with regard to the revocation of powers coupled with an interest by death. There is no differentiation to be made in this case. Oklahoma has come squarely under the doctrine that a power

coupled with an interest is irrevocable where there is an interest in the subject matter of the power the same as in other States. See

Kimmell vs. Power, 19 Okla. 339, 91 Pac. 687.

Schilling vs. Moore, 34 Okla. 155, 125 Pac. 487.

Flitsch vs. Bishop, 118 Okla. 272, 247 Pac. 1110. [55]

Second: In order to lay a foundation for an understanding of the statute which we are discussing, let us gather up the various state statutes on this subject.

In Ross on Probate, Volume I, Page 447, the Arizona Statute has been used as an index in the following manner.

“The Arizona Statute Provides: “If any person before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.” Ariz. Rev. St. 1721.”

“The Idaho, Montana, Oklahoma, South Dakota, Washington and Wyoming Statutes are the same as the Arizona, except that instead of the words “is chargeable therewith, and”

the Washington statute reads: "shall stand chargeable and be."

California at the present time does not now have this statute, but their statute was identical prior to 1907. See 11 Cal. Jur. 1103, Section 720.

Prior to the change of the statute in California, the Supreme Court of California had occasion to give construction to the statute, in *Jahns vs. Nolt-ing*, 29 Cal. 508; there the administrator charged in his Complaint that the Defendant "took, carried away, embezzled, alienated and has converted to his own use certain goods, chattels and effects, which were of the estate of the deceased."

In that case the widow of the deceased, intermediate to death and issuance of letters of administration, by gift, attempted to transfer title to certain personal property. The controversy in the Supreme Court was over the findings of the Lower Court, "that the Defendant did not embezzle or alienate and convert to his own use, contrary to the statute . . . . all or any of the goods . . . . or other property, which were of said Herman Schroeder, deceased in his lifetime, as in the Complaint of the Plaintiff set forth . . . ."

This was reversed by the Supreme Court, holding that the claim of good faith interposed was of no avail. We have searched diligently for construction of these statutes in harmony with the [56] contention of the Defendant here and failed to find any applicable decisions. The Supreme Court of Okla-

homa has given the statute exactly the interpretation indicated by its language. The most recent expression of that Court on the subject is at late as March 12th, 1935, in the case of *Sauls vs. Whitman* 42 Pac (2d) 275. There certain checks were delivered to the Defendant to be used after the death of the decedent, and they were so used. Good faith was asserted as a defense.

Relying upon the California decision of *Jahns vs. Nolting*, 29 Cal. 507, the Court said:

"No embezzlement being charged, this is an action involving alienation. This Court in *Aultman & Taylor Machinery Co. vs. Fuss*, 86 Okl. 168, 207 P. 308, 309, and in *Nichols & Shepard Co. vs. Dunnington*, 118 Okl. 231, 247 P. 353, in defining what is meant by the word "alienation," adopted the definition of the Supreme Court of California as expressed in *Jahns vs. Nolting*, 29 Cal. 507, as follows, "To alienate, signifies to wrongfully transfer such property to another. Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law," which definition of itself thereby signifies that the word "wrongful" means wrongful on account of its being in violation of the statute and in violation of the common law, rather than as signifying a wrongful state of mind. In other words, whether such an alienation is "wrongful" depends not so much on the state of mind as upon the acts done."



Again, in the same case, the Court said:

“In the early case of *Litz, Adm. vs. Exchange Bank of Alva*, 15 Okl. 384, 83 P. 790 . . . . It being admitted that the mortgagee acted in good faith, the trial court found the issues in favor of the defendant. This Court reversing the judgment, said: “But this fact would not warrant the mortgagee in advertising and selling the property before a special or general administrator was appointed.”

Again, in the same case, the Court said:

“In *Nichols & Shepard C. vs. Dunnington*, *supra*, it was stated that the term “alienate,” as used in said section, signifies the wrongful transfer of such property to another. A Judgment for the plaintiff in that case was reversed by this court, not on the ground of absence of bad faith, but because there was no transfer of the property. The mortgagee of personal property of a deceased person foreclosed against it just as in *Litz vs. Exchange Bank of Alva*, *supra*, but, instead of selling the property to a third party, as in the *Litz Case*, bid the property in itself and applied it on the mortgage debt. That is the distinction between the cases.

[57]

The *Nichols Case* is not based on an absence of wrongful alienation, but on the fact that there was no alienation at all.”



The Court in the last above cited case clearly establishes the fact that no wrongful intention is required, other than the intention to do the thing which the law forbids.

We think it would be a waste of time of the Court to attempt any further elucidation on the point, now that we direct attention to the controlling factor in the case. Our Statute in question was the statute of California at the time our codes were adopted; and, at that time the California Court had given the statute the construction we now contend for. The same construction will be given this adopted statute by our Court. See following cases:

Mares v. Mares, 60 Mont 36, 199 Pac 267.

State ex rel. Rankin v. State Board, 59 Mont 557, 197 Pac 988.

Haydon v. Normandia, 55 Mont 539, 179 Pac 460.

Steckpole v. Hallahan, 16 Mont 40, 28 L.R.A. 502, 40 Pac 80.

Largey v. Chapman, 18 Mont 563, 46 Pac 808.

Price v. Lush, 10 Mont 61, 9 L.R.A. 467, 24 Pac 749.

Butte & B. Consolidated Min Co. v. Montana Ore Purchasing Company, 25 Mont 41, 63 Pac 825. [58]

Miller v. Miller, 47 Mont 150, 131 Pac 23.

We are asking the Court to read in the light of this analysis the discussion of the Courts in the case cited by the Defendant. It will be found that

the reasoning of the Court does not apply to the facts like these. This Complaint does not charge embezzlement, neither is it based upon a set of facts disclosing that the mortgagee bid in the property itself. In cases where the mortgagee bid in the property itself rather than selling them to another, the Courts have said that it does not constitute alienation within the terms of the statute like ours, there being no charge in the status of the parties. In such cases, however, there still is a liability and the common law rule has not been superseded. Where there is actual fraud, the fraud then becomes an issue in the matter. Here, however, the record discloses that the property was sold to various individuals. It (the mortgaged property) was sold, "alienated" by the mortgagee under a power of sale, the right to exercise which was suspended by the statute in the interim between death and the appointment of an administrator. It needs no argument to enforce the purpose and high policy of such a statute. Were the mortgagee alive, or being dead, his representative appointed, someone is in existence who has an interest in the matter sufficient to cause every endeavor to be made to protect the property rights. It is to be conceived that a mortgagee can easily dispose of property amounting to a value more than the mortgage debt for the amount of the mortgage debt, or less, where there was no one to protect the mortgagor's rights or those of his successors in interest. The Complaint in this case makes it clear that valuable property,

far in excess of the amount of the mortgage debt, was so hastily disposed of as to leave a balance of the debt remaining. Moreover, the Court will observe in this case that two mortgages were executed by the decedent. See Exhibit "A" and "B" to Plaintiff's [59] Complaint. The first of those mortgages was for \$17,000.00, payable December the 15th, 1934. (Exhibit "A") Apparently this mortgage matured and was renewed on the 19th day of December, 1934, (Exhibit "B").

In Paragraph II of Plaintiff's Complaint, near the close of the Paragraph, attention is directed to the fact, in substance, that this latter mortgage admits that it (Exhibit "B") is a renewal and continuation of the indebtedness secured by the other mortgage. We come then to Exhibit "C", which is the statutory return of sale under the chattel mortgage foreclosure where power of sale provisions are employed. The report discloses that the Defendant purported to sell under Exhibit "A" property included in a mortgage not yet due. We think that one could seize for protection purposes under the powers granted in a chattel mortgage, property mortgaged, even during the prescribed period. That is not prohibited by the statute, but to go so far as to permit the sale of the property for a debt not yet due, in addition to such seizure, is defying the statute.

We respectfully submit to the Court that the Complaint states a good cause of action; that the things which Defendant now seeks to have stricken

from the Complaint are the things which meet its contention that good faith is an element in the case. If good faith does enter in, then that is a matter of defense. We do not concede that good faith is an issue, nor do the authorities, applicable to the facts, sustain the Defendant in cases of this character.

We respectfully submit that the Demurrer should be overruled.

Respectfully submitted.

BELDEN & DEKALB,  
RAYMOND E. DOCKERY,  
Attorneys for the Plaintiff.

[Endorsed]: Filed Oct. 17, 1935. C. R. Garlow,  
Clerk. [60]

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Thereafter, on October 28, 1935, Defendant's Reply Brief was duly filed herein, being in the words and figures following, to wit: [61]

[Title of District Court and Cause.]

#### DEFENDANT'S REPLY BRIEF

Plaintiff's reply brief on the demurrer herein has been received and the authorities and contents thereof noted.

The first impression created by such brief was this: why did the plaintiff omit all argument and reference to the controlling Montana case of

Muth v. Goddard, 28 Mont. 237; 98 Am. St.  
Rep. 553,

referred to in defendant's brief in chief. That case sets forth the rule in no uncertain terms that in Montana, where a mortgage contains a power of sale, the holder thereof "Could execute the power of sale (a power coupled with an interest) without reference to the administration of the mortgagor's estate, if he so elected." That rule, we submit in all sincerity, is determinative of the question involved in the case at bar. If plaintiff desires the Court to overrule the demurrer, it seems to the writer that they must first upset the *Muth v. Goddard* case, *supra*, or show that the decision in that case has been subsequently overruled or modified. That case, in the humble judgment of the writer hereof, constitutes an insuperable barrier to the maintenance of the present action.

Totally disregarding the law in Montana, plaintiff continues to refer to cases from the State of Oklahoma and on page two of the brief occurs the following: [62]

"Oklahoma recognizes that such a provision is a power coupled with an interest, but has confined the exercise of that power to cases where an administrator has been appointed. *Western Newspaper Union v. Thurmond*, 111 Pac. 204."

Counsel is in error as regards the holding of the Court. What the Court does hold is the following:

"As by virtue of the terms of the mortgage on condition broken, the mortgagee had a right to the possession of the mortgaged property



(*Mathew v. Mathew*, 138 Cal. 334, 71 Pac. 344), the judgment is contrary to law and is therefore reversed and rendered.”

Thus, it will be seen, that as regards mortgages containing a power of sale, the Oklahoma Court is in accord with Vermont, also with Montana, California, and other western states, in holding that on condition broken, the mortgagee has a right to the possession of the mortgaged property, and there is not one word in the opinion, which says, as is claimed by plaintiff, that the exercise of such power is limited to cases where an executor or administrator has been appointed. Quite the contrary; it appears that the Oklahoma case is based upon the California case of

*Mathew v. Mathew*, 71 Pac. 344,

which case sustains defendant's contention in the present case and is in accord with the Montana case of *Muth v. Goddard*, *supra*. We quote from the *Mathew* case the following:

“It is true that under section 2888 of our Civil Code the legal title of mortgaged property is in the mortgagor, and yet at the same time it must be admitted that the mortgagee has an interest in the mortgaged property; and here, this interest being by the very terms of the mortgage contract coupled with a right of possession, the refusal to yield that possession on demand amounted to a deprivation of a valuable right which the mortgagee had in the



property, and was a conversion of his interest in such property . . . *The death of the mortgagor did not affect the rights of the mortgagee under the contract, and the executor possessed no new rights to the property, or to the possession of it, that were not in the mortgagor in his lifetime. On default in the payment of the note, [63] the mortgagee had the right of possession of the property as well against the executor of the mortgagor as against the mortgagor himself.* It is equally clear that the executor cannot avoid personal responsibility for his tortious act by claiming that it was committed for the benefit of the estate under the order of the court. He was not ordered by the court to refuse to deliver property, the rightful possession of which was in the party demanding it.” (Italics ours)

It is obvious from the foregoing quotation that the plaintiff finds himself in the embarrassing position of having his Oklahoma Court declaring a rule of law which renders his position in the present case untenable.

The Oklahoma case of

Sauls v. Whitman, 42 Pac (2d) 275,

referred to and quoted from on pages four and five of plaintiff's reply brief, has no bearing on the issue of law before the Court and is not in point for the reason that no question of a power of sale coupled with an interest was involved in that case.

On page 7 of the Reply Brief, plaintiff's counsel make this representation to the court:

“It (the mortgaged property) was sold, ‘alienated’ by the mortgagee under a power of sale, the right to exercise which was suspended by the statute in the interim between death and the appointment of an administrator.”

The Montana court, in the Muth case, *supra*, the Oklahoma court in the Thermond case, *supra*, and the California Court in the Mathews case, *supra*, all follow the obviously sensible rule, that the death of the mortgagor does not affect the power of sale in a mortgage. Counsel for plaintiff alone seem to be the authors of the rule that the power of sale is suspended between the death of the mortgagor and the appointment of an administrator. No authorities are cited to sustain their contention, while the Thermond case, cited by them, demonstrates the fallacy of it. So also does the Montana case cited by the defendant (Muth vs. Goddard) and the Mathews case from California.

On page 8 of the Reply Brief, some irrelevant argument is indulged in regarding the second mortgage, attached to the complaint as Exhibit “B”. The complaint shows that the defendant was acting pursuant to the power of sale contained in Exhibit “A” (see [64] Exhibit “C”, Notice of Sale, and Exhibit “D”, Return of Sale, attached to complaint). No allegation is made in the complaint that the mortgagee was not entitled to proceed under the

earlier mortgage; impliedly, at least, it is admitted that the mortgagee had such right save for the death of the mortgagor. Hence, it is submitted that the allegations of the complaint do not justify, nor will they support, the attempted argument above referred to.

In conclusion, it is respectfully submitted that the learned counsel for the plaintiff have wholly failed to meet or answer the arguments advanced by the defendant with reference to the power of sale feature of the case and that the authorities presented to this court amply sustain the action of the mortgagee in foreclosing the mortgage in question under the power of sale therein contained following the death of the mortgagor; and that the demurrer should be sustained.

The writer hereof finds no authority in the rules of court for the filing of a reply brief in a case like this. However, counsel for plaintiff have assumed to file a reply brief and by the same token defendant files its reply.

Respectfully submitted.

J. R. WINE,

Attorney for Defendant.

Filed Oct. 28, 1935. C. R. Garlow, Clerk. [65]

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Thereafter, on November 29, 1935, an Amended Complaint was duly filed herein, being in the words and figures following, towit: [66]

[Title of District Court and Cause.]

### AMENDED COMPLAINT

By leave of Court, Plaintiff files this, his amended Complaint, and for cause of action against the Defendant, complains and alleges:

#### I

That by an order of the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, duly given and made on the 4th day of April, 1935, the Plaintiff was appointed, and now is the duly appointed, qualified and acting administrator of the Estate of Simon T. Douglas, deceased, and has qualified therein by executing the bond and taking the oath prescribed by law.

#### II

That before the appointment of Plaintiff, or any administrator, or executor, whatsoever for the estate of Simon T. Douglas, deceased, and after the death of Simon T. Douglas, deceased, which occurred on the 12th day of January, 1935, to wit on or about February 5th, 1935, the Defendant wrongfully took into its possession, sold, alienated, converted and disposed of to its own use, property and effects of said decedent, and of which said decedent had been up to the time of his death, and his estate and Plaintiff since said time was and were, lawfully possessed, consisting of

1453 1934 ewe lambs and a few wethers

1080 old ewes

1273 two, three, four and five year old ewes  
21 head of horses  
308 sacks of molasses cake  
236 rams, bucks and old bucks  
36 tons of hay  
800 Bushel of oats  
90 tons of oat hay  
and

wagons, trucks, automobiles, camp outfits, saddles, harnesses, [67] mowers, hay racks, stackers, loaders, and all other and similar ranch and farm machinery, said property being of the value of \$31,500.20, and to the damage of the estate of which the Plaintiff is administrator in double said value as hereinafter set forth.

### III

That said property was so wrongfully alienated and converted at a time intermediate the death of Simon T. Douglas, deceased, and the appointment of Plaintiff as aforesaid as such administrator, and before the appointment of any administrator or executor, and all contrary to the provisions of Section 10140 of the Revised Codes of the State of Montana, for the year 1921, reading as follows, towit:

“If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is charged therewith and liable to an action by the executor



or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.”

Wherefore, Plaintiff prays judgment against the Defendant for the sum of \$63,000.00, the same being double the value of the said property so converted by Defendant, and for Plaintiff's costs and disbursements herein expended and incurred.

BELDEN & DeKALB

RAYMOND E. DOCKERY

Attorneys for the Plaintiff.

State of Montana

County of Fergus—ss.

Raymond E. Dockery, being first duly sworn, deposes and says:

That he is the Attorney for the Plaintiff in the foregoing action; that he has read the above and foregoing Amended Complaint and knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge, information and belief as such attorney; that affiant makes this affidavit for the reason that said plaintiff is not present within the County of Fergus, State



of Montana, where this verification is made and where affiant resides at the time of making the same.

RAYMOND E. DOCKERY.

Subscribed and sworn to before me this 27th day of November, 1935.

(Seal)

MAXINE SINGLEY

Notary Public for the State of Montana. Residing at Lewistown. My commission expires Sept. 21, 1938.

[Endorsed]: Filed Nov. 29, 1935. C. R. Garlow, Clerk. [68]

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Thereafter, on December 3, 1935, a Demurrer to the Amended Complaint was duly filed herein, which is in the words and figures following, towit: [69]

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[Title of District Court and Cause.]

### DEMURRER

Comes now the above named defendant and demurs to the amended complaint of said plaintiff on file herein upon the ground and for the reasons:

#### I.

That said complaint fails to state facts sufficient to constitute a cause of action against said defendant.

#### II.

That said amended complaint is ambiguous, unintelligible and uncertain in the following particu-

lars, to-wit: that it cannot be ascertained from said amended complaint if the defendant is sued as a partnership, joint stock company, corporation or otherwise, in that there is no allegation in such amended complaint as to the capacity of the said defendant to appear as a party litigant or to be sued and if it is intended by plaintiff to claim that said defendant is a corporation, there is no allegation to the effect.

J. R. WINE

Attorney for Defendant.

[Endorsed]: Filed Dec. 3, 1935. C. R. Garlow, Clerk. [70]

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Thereafter, on May 12, 1936, an Order Overruling Demurrer to Amended Complaint was duly entered herein, being in the words and figures following, towit: [71]

[Title of District Court and Cause.]

This cause was duly called for hearing this day for arguments on Demurrer to Amended Complaint, there being no appearance by counsel for either side. Thereupon it appearing to the court that counsel have agreed that the demurrer may be overruled and 30 days be granted to answer, the court, after due consideration, ordered the demurrer overruled and granted 30 days to defendant to answer.

Entered in open court May 12, 1936, at Great Falls, Montana.

C. R. GARLOW, Clerk. [72]

Thereafter, on June 25, 1936, an Answer and Cross Complaint was duly filed herein, being in the words and figures following, towit: [73]

[Title of District Court and Cause.]

## ANSWER AND CROSS COMPLAINT

Comes now the above named defendant and for its answer to the amended complaint of the plaintiff on file herein, admits, alleges and denies as follows:

### I.

Admits the allegations of Paragraph I of said amended complaint.

### II.

Denies generally each and all the allegations of Paragraphs II and III of said amended complaint.

### III.

Save and except as herein admitted, defendant generally denies each and every allegation, matter and thing in said amended complaint contained.

For a Further Answer and Affirmative Defense to Said Amended Complaint, and By Way of Cross-Complaint thereto, Defendant Alleges:

### I.

That the defendant, the Regional Agricultural Credit Corporation of Spokane, Washington, hereinafter called the corporation, is duly organized

and existing under and by virtue [74] of Section 201 (e) of an Act of Congress of the United States known and cited as the Emergency Relief and Construction Act of 1932 (12 U. S. C. Section 1148) and has its principal place of business in the City of Helena, County of Lewis and Clark, and State of Montana; that the said Corporation is an instrumentality of the United States; that, pursuant to the Act aforementioned, all capital of the Corporation was subscribed for by the Reconstruction Finance Corporation, a governmental agency created, capitalized and owned by the United States; and that the capital so subscribed was paid for out of money specifically appropriated and made available for that purpose by Congress; that all property of the Corporation was obtained by the use of money furnished by the United States through its said agency, the Reconstruction Finance Corporation, and that such property is and at all times has been used by the Corporation solely as a means to the accomplishment of the public purposes for which it was created; that no one will receive any profit or dividend from the business or property of the Corporation; that the Corporation is operated and managed under rules and regulations prescribed by the Farm Credit Administration, by officers and agents appointed by the Farm Credit Administration, an independent office or establishment of the Government of the United States; that all expenses incurred in connection with the operation of the

Corporation are paid by the Reconstruction Finance Corporation, which is wholly owned and operated by the United States as a governmental agency, and that any loss which may be sustained in the operation of the Corporation will result in a loss to the United States; that all of the capital stock of the Corporation and property owned by it, including the note and mortgage herein sued upon, are beneficially owned by the United States of America; that the Corporation, in pursuance to the [75] authority granted to it, has heretofore engaged in the business of making loans on livestock and other personal property, such loans being evidenced by promissory notes secured by chattel mortgages describing the security of such loan.

## II.

That on and prior to the 27th day of December, 1933, one Simon Douglas was the owner, in the possession and entitled to the possession of certain livestock and other personal property, including the property mentioned and described in plaintiff's amended complaint; that in pursuance to the authority granted to the Corporation on and prior to the 27th day of December, 1933, and on said 27th day of December, 1933, the said Simon Douglas, for a valuable consideration, made, executed and thereafter delivered to Regional Agricultural Credit Corporation of Spokane, Washington, the above named defendant, his certain promissory note in the words and figures following, to-wit:



“Due December 15, 1934 No. 12413 \$17,000.00

Helena, Montana, December 27, 1933.

December 15, 1934.....after date, for value received, we and each of us, jointly and severally, promise to pay to the order of the Regional Agricultural Credit Corporation of Spokane, Washington, at its office in the City of Helena, State of Montana Seventeen Thousand and no/ 100 Dollars, with interest at the rate of Six and One-half ( $6\frac{1}{2}$ ) per cent per annum from date hereof, payable at maturity.

In the event this note is placed after maturity in the hands of an attorney for collection or suit is brought on the same, or any portion thereof, we and each of us, jointly and severally, further agree to pay such reasonable attorney's fees and costs of collection as may be permitted by law to be charged.

The makers and indorsers of this note severally waive presentment for payment, demand, protest, and notice of non-payment thereof, and all defenses on the ground of any extension of the time of payment that may be given by the holder or holders to them or either of them.

(Signed) SIMON DOUGLAS

Address Armells, Montana.”

### III.

That to secure the payment of said promissory note, [76] and to secure additional future advances,



if any, not in excess of \$20,000.00, the said Simon Douglas, on said 27th day of December, 1933, made, executed and thereafter delivered to said defendant, as mortgagee, his certain chattel mortgage, dated on said date, covering the livestock and other personal property therein described, which said chattel mortgage was duly and regularly signed and acknowledged by said Simon Douglas, and had endorsed thereon a written receipt by him for a true copy of said mortgage, and there was also attached to said chattel mortgage an affidavit on behalf of the mortgagee, as required by law, that said mortgage was made in good faith to secure the amount named therein without any design to hinder, delay or defraud creditors of the mortgagor, and said mortgage was thereafter and on the 8th day of January, 1934, at the hour of 4.55 o'clock P. M., of said day, duly filed in the office of the County Clerk of Fergus County, Montana, and remains as a file and record of said office, and that said chattel mortgage and the record thereof is hereby referred to and by this reference made a part hereof; that a true copy of said mortgage is hereunto attached, marked Exhibit "A", hereby referred to and by this reference made a part hereof.

#### IV.

That thereafter the said Simon Douglas died intestate in Fergus County, Montana, on or about the 12th day of January, 1935.

## V.

Defendant further alleges that the aforementioned indebtedness was not paid at maturity, or otherwise, or at all, by the said Simon Douglas, or any one else, and that on or about the 27th day of November, 1934, said Simon Douglas filed a written application with said defendant for a renewal and a continuation of said mortgage indebtedness; that pursuant to said application a new note dated the 19th day of December, 1934, was signed by said Simon Douglas [77] and a new chattel mortgage of even date therewith was executed by him as security therefor, and said last mentioned chattel mortgage was filed in the office of the County Clerk of Fergus County, Montana, on the 28th day of December, 1934, at 4:00 o'clock P. M., of said day. Defendant further alleges that said application for a renewal loan was never closed or completed, and no money was ever loaned and no advances were ever made thereunder, and said renewal loan was never completed or closed, by reason of the death of said Simon Douglas, as hereinbefore set forth; that as part of the standard procedure of said defendant in making loans secured by chattel mortgage or chattel mortgages, said loans were never closed or completed until after the approval thereof by the local counsel for said defendant. And in this connection the defendant alleges that the contemplated renewal or continuation loan, intended to be secured by the last mentioned chattel mortgage, dated December 19, 1934, as aforesaid, was never

submitted to nor approved by said local counsel by reason of the death of the said Simon Douglas, as hereinbefore set forth.

## VI.

Defendant further alleges that immediately after the death of said Simon Douglas, defendant was obliged to, and did, employ help to care for and preserve the personal property and security mentioned and described in said chattel mortgage, dated the 27th day of December, 1933, for the reason that no heir of the said Simon Douglas, nor any personal representative of his, nor any other person, assumed or pretended to care for, protect or preserve such security, and that no person was appointed administrator of the estate of said deceased until on or about the 9th day of April, 1935.

## VII.

Defendant further alleges that on the date of his death, [78] to-wit: January 12, 1935, the said Simon Douglas was indebted to said defendant in the amount of \$16,328.48, inclusive of interest at the rate of six and one-half ( $6\frac{1}{2}$ ) per cent per annum, on said mortgage indebtedness.

## VIII.

That for the purpose of protecting the said security and the interests of said defendant, as well as the interests of the estate of said Simon Douglas, deceased, and in pursuance of the power of sale contained in said chattel mortgage dated the 27th

day of December, 1933, as well as in pursuance of the statute in such case made and provided, the said defendant by reason of the default in the conditions of said chattel mortgage, and on the 28th day of January, 1935, posted five notices of said sale respectively, in five public places in said Fergus County, Montana, one of said notices being posted at the designated place of sale, said notices specifying that said property would be sold on the 5th day of February, 1935, at the hour of 2:00 o'clock P. M. at the ranch of said mortgagor, Simon Douglas, located fourteen miles northeast from Armells, in said Fergus County, Montana; that on said 5th day of February, 1935, at the hour of 2:00 o'clock P. M., at said above mentioned ranch of said mortgagor, in said Fergus County, said defendant proceeded to sell and did sell at public auction, pursuant to the power of sale contained in said chattel mortgage, to the highest respective bidders for cash, the said property described in said chattel mortgage; that the respective purchasers, the property so sold, and the prices paid therefor are as follows, to-wit: [79]

Daily Johnson:	1934 ewe lambs and few wethers at \$4.10, 1453 head	\$ 5,957.50
O. A. Nepstad:	Old band of ewes at \$2.25—1080 head	2,430.00
H. Lingshire:	Young band of ewes at \$3.40—1238 head	4,205.80
Matt Wildschultz:	21 head of horses	860.00
Fergus Ranch Co.:	308 sacks molasses cake at \$1.30 per sack	400.40
Tom Wight:	256 cut back lambs and ewes; some old bucks	110.00
Mike Machler:	Machinery, tools, etc., as follows: 1 Ford coupe, small tools, 3 shovels, 2 spades, 2 iron bars, 2 hand saws, 2 cross cut saws, 1 vice, 1 anvil, 1 square, 3 log chains, 2 sheep hooks, forge, 5 axes, 1 hand rake, 1 pitch fork, 7 lanterns, 2 pack saddles, 4 sets harness; 1 potato cultivator, 1 snow plow, 1 power wood saw, 1 Twin City Tractor, 1 potato planter, 2 bull rakes, 1 hay rake, 1 hay stacker, 3 sheep wagons, 2 mowers, 2 bob sleds, 2 hay racks, 1 truck wagon, 2 wagons, 1 two wheel cart, 4 pack saddle bags, 2 saddles, 1 stop, 40 tepee tents, 3 lambing tents, 15 panels, 35 sheep pelts, 30 small panels, 46 tons old hay, very poor at \$2.10	435.00
H. R. Cameron:	800 bu. oats at \$1.50	96.80
Tom Wight:	Oat hay and Blue Joint, for \$4.25 T. 90 tons later resold to D. G.	12.00
J. A. Robins, Trustee:	Disbrow for \$5.50	495.00
	Total	\$15,002.10



that the total gross amount received for such property was and is the sum of \$15,002.10, which said sum defendant alleges was and is the real and market value of said mortgaged property and all thereof on said date; that within ten days thereafter, to-wit: on the 15th day of February, 1935, the said defendant, as required by law, filed a return of sale under said chattel mortgage foreclosure, pursuant to the statute in such case made and provided, in the office of the County Clerk of Fergus County, Montana, and the same was attached to the said chattel mortgage as required by law, which said return and the record thereof is hereby referred to and by this reference made a part hereof; that a true copy of said return (which has attached thereto a copy of the "Notice of Sale", hereinbefore mentioned) is hereto attached, marked Exhibit "B", hereby referred to and by this reference made a [80] part hereof; that the personal property mentioned and described in plaintiff's amended complaint herein constitutes a portion of the personal property mentioned and described in said chattel mortgage dated December 27, 1933, and in said return of sale thereunder; that neither said chattel mortgage nor the hereinbefore mentioned sale thereunder, nor the return of sale under said chattel mortgage, hereinbefore referred to, nor any one of them, has been vacated, annulled, set aside, or adjudged or decreed to be invalid or void, and that the same and all thereof remain and still are in full force and effect.



That every act done and thing performed by the said defendant in connection with said sale, as the mortgagee named in said chattel mortgage dated December 27, 1933, was done and performed in accordance with and pursuant to the terms and provisions of said chattel mortgage and the power of sale therein contained, and lawfully and in accordance with the statutes of the State of Montana.

### IX.

That said chattel mortgage sale, hereinbefore mentioned, is the identical sale mentioned and referred to in plaintiff's amended complaint on file herein, and the only sale ever made or conducted at any time by the defendant, of property owned or claimed by said Simon Douglas, deceased, or his estate, or his personal representative.

### X.

That on February 5th 1935, the date of said sale, the amount due said defendant on said chattel mortgage indebtedness was the sum of \$16,388.92, and that the gross proceeds of said sale amounted to the sum of \$15,002.10, and that the net proceeds of said sale amounted to the sum of \$14,694.28, and the account of said Simon Douglas was given credit for said amount, and that [81] after applying the credit for said net proceeds of said sale, there remained, and now remains, a balance of \$1,694.64 owing to the above named defendant on said chattel mortgage indebtedness, besides interest thereon from the 5th

day of February, 1935, at the rate of 6½% per annum.

# XI.

That on the 13th day of June, 1936, at Lewistown, Fergus County, Montana, the claim for the balance hereinbefore set forth, verified by the oath of H. W. Dickey, Secretary of defendant corporation, in behalf of the claimant, and upon which this cross-complaint is founded, was duly presented in writing by the defendant to the said plaintiff, as such administrator, for allowance, but that said administrator refused or neglected to endorse such allowance or rejection for ten days after the claim had been presented to him and the said defendant elects, at its option, to consider such refusal and/or neglect as being deemed equivalent to rejection of such claim on the tenth day after such presentation; that a true copy of said claim (excepting the copy of the note and the copy of the mortgage thereto attached, which are omitted for the sake of brevity, as the note is set out verbatim in Paragraph II of the cross-complaint, and a copy of said chattel mortgage is attached to the cross-complaint as Exhibit "A") as presented, is hereunto attached, marked Exhibit "C", hereby referred to and by this reference made a part of this cross-complaint; that the time for presentation of claims against said estate has not yet expired.

Wherefore, having fully answered defendant prays judgment as follows:

## 1.

That said amended complaint be dismissed, and that plaintiff take nothing by his said action. [82]

That the defendant have judgment against said plaintiff for the sum of \$1,694.64, together with interest thereon at the rate of 6½% per annum from February 5, 1935, until paid, and for such other and further relief as may be meet and equitable in the premises; and for costs of suit herein incurred.

J. R. Wine,

Attorney for Defendant.

State of Montana,

County of Lewis and Clark—ss.

H. H. Pigott, being first duly sworn on oath, deposes and says:

That he is an officer, to-wit: Executive Vice President and Manager of defendant corporation; that as such officer he makes this verification for and on behalf of said defendant; that he has read the foregoing answer and cross-complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

H. H. PIGOTT,

Subscribed and sworn to before me this 23rd day of June, 1936.

A. E. REDINGTON,

Notary Public for the State of Montana, residing at Helena, Montana.

My Commission expires October 18th 1939.

[Seal]

[Endorsed]: Filed June 25, 1936. C. R. Garlow,  
Clerk. [83]

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Thereafter, on July 29, 1936, a Reply was duly filed herein, being in the words and figures following, to-wit: [84]

[Title of District Court and Cause.]

## REPLY

Comes now the plaintiff, and for reply to defendant's further answer and affirmative defense and counterclaim herein, denies, admits, qualifies and alleges:

### I.

Admits that defendant is a corporation organized and existing under and by virtue of Section 1148, Title 12 U. S. C. A., with its principal office and place of business at Helena, Montana, and has been engaged in making loans on livestock and other personal property; but denies each and every other allegation, matter and thing in Paragraph I of said further answer and affirmative defense and cross-complaint; and alleges that if said other allegations are true, they are superfluous and immaterial.

### II.

Admits Paragraph II, except that plaintiff de-

nies that some of the property described in plaintiff's amended complaint was on the 27th day of December, 1933, owned by Simon Douglas.

### III.

Admits Paragraphs III and IV of said further answer and affirmative defense and cross-complaint.

[85]

### IV.

Admits that the indebtedness was not paid in full at maturity and a new note dated December 19, 1934, was signed by Simon Douglas and a new chattel mortgage executed, delivered and filed in the office of the County Clerk and Recorder of Fergus County, Montana, on the 28th day of December 1934, at 4:00 o'clock P. M., and denies each and every other allegation, matter and thing in Paragraph V of said further answer and affirmative defense and cross-complaint; and plaintiff further avers that said chattel mortgage dated December 19, 1934 operated to and did annul said mortgage of December 27th, 1933, and novated the debt and the relationship of the said parties as therein set forth, and a copy thereof is hereunto annexed marked Exhibit A and by reference thereto made a part thereof.

### V.

Admits that no administrator of the estate of Simon Douglas was appointed until April 9, 1935,



but denies each and every other allegation of Paragraph VI of said further answer, affirmative defense and cross-complaint.

## VI.

Denies the allegations of Paragraph VII of said further answer, affirmative defense and cross-complaint, and alleges the truth and fact to be that said Simon Douglas was not indebted in any amount under said chattel mortgage of December 27th, 1933.

## VII.

Admits that on the 28th day of January, 1935, defendant posted purported notices of sale under the Chattel mortgage, copy of which said notice is included in the marked Exhibit B. annexed to defendant's answer, fixing February 5, 1935, at two o'clock P. M. for sale of the property in the said chattel mortgage dated December 27th, 1933, listed and described, and that [86] on February 5, 1935, purportedly sold the said property, and made a purported return of said alleged sale, for some sum which plaintiff believes to be as alleged, viz: \$15,002.10; but denies each and every other allegation, matter and thing in Paragraph VIII of said further answer and affirmative defense and cross-complaint contained. That said sale and all proceedings thereunder was and were void, and in violation of Section 10140 of the Revised Codes of Montana for the year 1921, and for the year 1936.

## VIII.

Admits that said purported chattel mortgage sale is the sale referred to in plaintiff's amended complaint and the only purported sale ever made or conducted at any time by defendant of property owned or claimed by Simon Douglas, deceased, or his estate.

## IX.

Denies the allegations of Paragraph X of said further answer, affirmative defense and cross-complaint, and alleges the truth and fact to be that said Simon Douglas was not indebted in any amount under said chattel mortgage of December 27th, 1933.

## X.

Admits the allegations of Paragraph XI of defendant's further answer and affirmative defense and cross-complaint herein.

Wherefore, having fully replied to defendant's further answer and affirmative defense and cross complaint, plaintiff prays judgment as demanded in his amended complaint herein.

BELDEN & DEKALB

RAYMOND E. DOCKERY.

Attorneys for Plaintiff.

[Endorsed]: Filed July 29, 1936. C. R. Garlow, Clerk. [87]

State of Montana,  
County of Fergus—ss.

Raymond E. Dockery, being first duly sworn, deposes and says:

That he is the Attorney for the Plaintiff in the foregoing action; that he has read the above and foregoing Reply and knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge, information and belief as such attorney; that affiant makes this affidavit for the reason that said Plaintiff is not present within the County of Fergus, State of Montana, where this verification is made and where affiant resides at the time of making the same.

RAYMOND E. DOCKERY

Subscribed and sworn to before me this 29th day of July, 1936.

(Seal) GUY M. BRISLAWN,

Notary Public for the State of Montana, residing  
at Lewistown, Montana. My Commission expires April 24, 1939. [88]

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Thereafter, on August 18, 1936, a Motion to Strike from Reply was duly filed herein, being in the words and figures following, towit: [89]

[Title of District Court and Cause.]

MOTION TO STRIKE.

I.

Comes now the above named defendant and moves the Court to strike from the so-called reply of the plaintiff herein (said pleading in fact being an answer to defendant's cross complaint), the following designated portion thereof, towit:

“and alleges that if said other allegations are true, they are superfluous and immaterial.”

appearing in the last two lines of paragraph I of said so-called reply, upon the grounds and for the reasons:

- (a) That the same is irrelevant;
- (b) That the same is immaterial;
- (c) That the same is superfluous;
- (d) That the same is not an allegation of any material or issuable fact but is a mere bald conclusion of law.

II.

Defendant further moves the Court for an order to strike from paragraph designated IV that portion appearing at the end of said paragraph and being the first five lines at the top of page 2 of said so-called reply and reading as follows:

“and plaintiff further avows (avers) that said chattel mortgage dated December 19, 1934, operated to and did annul said mortgage of December 27th, 1933, and novated the debt and the relationship of the said parties as therein

set forth, and a copy thereof is hereunto annexed marked Exhibit A and by reference thereto made a part hereof.”

upon the grounds and for the reasons:

- (a) That the same is irrelevant;
- (b) That the same is immaterial;
- (c) That the same is superfluous;
- (d) That the same is not an allegation of any material or issuable fact but is a mere bald conclusion of law;
- (e) That the defense of novation is a special defense and must be especially pleaded; that the facts constituting the alleged novation must be set forth: that the portion of the pleading above quoted omits the essential facts necessary to constitute a defense on the grounds of a novation or on any other grounds. [90]

### III.

Defendant further moves the Court for an order to strike from paragraph designated VII of plaintiff's so-called reply the following language appearing at the end of said paragraph, to-wit:

“That said sale and all proceedings thereunder was and were void, and in violation of Section 10140 of the Revised Codes of Montana for the year 1921, and for the year 1936.”

upon the grounds and for the reasons:

- (a) That the same is irrelevant;
- (b) That the same is immaterial;



(c) That the same is superfluous;

(d) That the same is not an allegation of any material or issuable fact but is a mere bald conclusion of law.

This motion is made and is to be considered as a separate motion to each of the above designated portions of the so-called reply and is made and based upon the records, files, pleadings and papers herein.

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Attorney for Defendant.

[Endorsed]: Filed August 18, 1936. C. R. Garlow,  
Clerk. [91]

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[Title of District Court and Cause.]

### NOTICE OF MOTION

To the Above Named Plaintiff and to Raymond E.  
Dockery, Esq., and Messrs. Belden & De Kalb,  
His Attorneys:

You and each of you will please take notice and you are hereby notified that the above named defendant will call up for hearing and determination and present to the above entitled Court the annexed Motion to Strike in the courtroom of said Court in the Federal Building in the City of Great Falls in said State and District at ten o'clock in the forenoon on Monday, the 31st day of August, 1936, or as soon thereafter as counsel can be heard.

Dated August 18th, 1936.

J. R. WINE,

Attorney for Defendant.

[92]

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Thereafter, on November 6, 1937, an Amended Reply was duly filed herein, being in the words and figures following, towit: [93]

[Title of District Court and Cause.]

### AMENDED REPLY

Comes Now, the Plaintiff, and for reply to Defendant's further Answer and affirmative defense and counterclaim herein, denies, admits, qualifies and alleges:

#### I.

Admits that Defendant is a corporation, organized and existing under and by virtue of Section 1148, Title 12 U. S. C. A., with its principal office and place of business at Helena, Montana, and has been engaged in making loans on livestock and other personal property; but, denies each and every other allegation, matter and thing in Paragraph I of said further Answer and affirmative defense and cross-complaint.

#### II.

Admits Paragraph II, except that Plaintiff denies that some of the property described in Plaintiff's amended Complaint, was on the 27th day of December, 1933, owned by Simon Douglas.

## III.

Admits Paragraphs III and IV of said further Answer and affirmative defense and cross-complaint. [94]

## IV.

Admits that the indebtedness was not paid in full at maturity and a new note, dated December 19, 1934, was signed by Simon Douglas and a new chattel mortgage executed, delivered and filed in the office of the County Clerk and Recorder of Fergus County, Montana, on the 28th day of December, 1934, at 4:00 o'clock P. M., and denies each and every other allegation, matter and thing in Paragraph V of said further answer and affirmative defense and cross-complaint; and, Plaintiff further avers that said chattel mortgage, dated December 19, 1934, was given and received in satisfaction of and as a substitution for said mortgage of December 27th, 1933, and, then and thereafter, the rights and obligations of the said parties were as in said later mortgage, set forth, and a copy of said later mortgage is hereunto annexed, marked Exhibit "A", and by reference thereto made a part hereof.

## V.

Admits that no Administrator of the Estate of Simon Douglas was appointed until April 9, 1935, but denies each and every other allegation of Paragraph VI of said further Answer, affirmative defense and cross-complaint.

## VI.

Denies the allegations of Paragraph VII of said further Answer, affirmative defense and cross-complaint, and alleges the truth and fact to be that said Simon Douglas was not indebted in any amount under said chattel mortgage of December 27, 1933.

[95]

## VII.

Admits that on the 28th day of January, 1935, Defendant posted purported notices of sale under the chattel mortgage, copy of which notice is included in the marked Exhibit "B", annexed to Defendant's Answer, fixing February 5, 1935, at two o'clock, P. M., for sale of the property in the said chattel mortgage, dated December 27th, 1933, listed and described, and that on February 5th, 1935, purportedly sold the said property, and made a purported return of said alleged sale, for some sum which Plaintiff believes to be alleged, viz: \$15,002.10; but denies each and every other allegation, matter and thing in Paragraph VIII of said further Answer and affirmative defense and cross complaint contained.

## VIII.

Admits that said purported chattel mortgage sale is the sale referred to in Plaintiff's amended Complaint and the only purported sale ever made, or conducted, at any time by Defendant of property, owned or claimed, by Simon Douglas, deceased, or his estate.

## IX.

Denies the allegations of Paragraph X of said further Answer, affirmative defense and cross-complaint, and alleges the truth and fact to be that said Simon Douglas was not indebted in any amount under said chattel mortgage of December 27th, 1933.

## X.

Admits the allegations of Paragraph XI of Defendant's further Answer and affirmative defense and cross-complaint herein.

Wherefore, having fully replied to Defendant's further Answer and affirmative defense and cross-complaint, Plaintiff prays judgment as demanded in his amended Complaint herein.

H. LEONARD DeKALB,  
RAYMOND E. DOCKERY.

Attorneys for Plaintiff. [96]

State of Montana,  
County of Fergus—ss.

Raymond E. Dockery, being first duly sworn, deposes and says:

That he is the Attorney for the Plaintiff in the foregoing action; that he has read the above and foregoing Amended Reply and knows the contents thereof; that the matters and things therein stated are true to the best of his knowledge, information and belief as such Attorney; that affiant makes this Affidavit for the reason that said Plaintiff is not present within the County of Fergus, State of



Montana, where this verification is made and where affiant resides at the time of making the same.

RAYMOND E. DOCKERY,

Subscribed and sworn to before me this 30th day of October, 1937.

META K. BOYER,

Notary Public for the State of Montana. Residing at Lewistown. My commission expires August 23, 1940.

(Notarial Seal)

[Endorsed]: Filed Nov. 6, 1937. C. R. Garlow, Clerk. [97]

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EXHIBIT "A"

This Mortgage, Made the 19th day of December in the year 1934 by Simon T. Douglas, (whose postoffice address is Armalls, State of Montana), mortgagor, to Regional Agricultural Credit Corporation of Spokane, Washington, (maintaining a branch at Helena, Montana) mortgagee:

(The word "mortgagor" whenever herein used means "mortgagors" if there be more than one mortgagor; and where the word "mortgagee" is used herein it shall include the successors and assigns of the mortgagee; and words used herein in the masculine gender include the feminine and neuter and the singular number includes the plural and the plural the singular.)

Witnesseth: That for a valuable consideration, to-wit: a loan or loans of money, the mortgagor

mortgages to the mortgagee the following described personal property situated, at the time of the execution of this mortgage, in the County (or Counties) of Fergus, and Judith Basin, State of Montana, to-wit:

All cattle, horses, sheep, tools, machinery, and equipment of every kind, character, and description owned by the mortgagor, inclusive of the following:

3 cows

These 3 cows are, or are to be, branded YD on right hip.

22 horses

There are also included in this mortgage any and all cattle and horse brands belonging to the mortgagor or recorded in the mortgagor's name.

200 ewes one year old

150 ewes two years old

50 ewes three years old

50 ewes four years old

700 ewes five years old

1156 ewes six years old

50 ewes aged

1653 ewe lambs

114 wether lambs

60 mixed lambs

88 bucks

1424 other sheep appraised and to be sold to the Agricultural Adjustment Administration.

All above sheep marked: Z on back with red or black paint.

All forage crops and other livestock feed growing or to be grown on lands owned, leased or controlled by mortgagor during the year 1935 or next maturing after the date hereof.

Also: All hay and other livestock feed now owned, or hereafter acquired, during the life of this mortgage, by purchase, harvest or otherwise, inclusive of the following: 265 tons of hay.

Also: All unsold 1934 wool.

The indebtedness secured hereby, or part hereof, is a renewal and continuation of the indebtedness secured by mortgage, or mortgages, between the parties hereto now on file in the office of the County Clerk of the above named county, or counties.

The marks and brands used to describe the livestock are holding marks and brands and carry the title although said livestock may have other marks and brands. This mortgage is intended to include and there is included herein all increase of like kind or progeny, also the wool of animals described herein from year to year during the life of the mortgage.

There is also included herein and mortgaged hereby all wagons, horses, trucks, automobiles, camp outfits, saddles, harnesses, mowers, hay rakes, stackers, loaders and other similar ranch or farm machinery. Also all water, grazing or right of way privileges, permits or agreements. There is further mortgaged and included herein all hay, straw, range, forage and other livestock feed now owned by mortgagor, or hereafter acquired by harvest, purchase

or otherwise during the life of this mortgage provided, however, such livestock feed may be used solely for the purpose of feeding the livestock mortgaged herein and for no other purpose. It is understood, agreed and covenanted that this mortgage shall and it does mortgage all of the property covered by specific or general description herein of the kind or character referred to in any manner acquired by the mortgagor during the life of this mortgage, unless expressly excepted in the type-written portion hereof. While exchanges or substitutions are covered by this mortgage, none shall be permitted except by written consent of the mortgagee in each separate instance. The mortgagee and/or any holder of this mortgage has the right at all times to examine and check all property intended to be mortgaged hereunder. [98]

This mortgage is given as security for the payment to the Regional Agricultural Credit Corporation of Spokane, Washington, at its office in the city of Helena, State of Montana, of the sum of Nineteen Thousand Two Hundred Seventy (\$19,270.00) Dollars now loaned to the mortgagor, according to the terms of mortgagor's promissory note, bearing even date herewith, payable to the order of the mortgagee, and described as follows: one note for \$19,270.00, payable July 1, 1935 after date, said note being for value received, and to bear interest at the rate of six and one-half per cent ( $6\frac{1}{2}\%$ ) per annum from date until paid, interest payable at maturity.

The makers, endorsers and guarantors of said note severally agree to pay an attorney fee in case payments shall not be made at maturity and the makers, endorsers and guarantors of said note severally waive presentment for payment, demand, protest, and notice of non-payment thereof and all defenses on the ground of any extension of the time of payment that may be given by the holder or holders to them or either of them. The endorsers and guarantors also severally consent to any extension of time and substitution of collateral.

This Mortgage is also security for such further and additional sums of money as may from time to time, during the life of this instrument, but only at the discretion of the mortgagee, be advanced and loaned by said mortgagee or assigns, to said mortgagor, together with interest thereon at the rate above specified, which said future advances are now in contemplation and when made, are to be as fully secured hereby, as though the same were specifically described and set forth herein, but for no greater additional amount, however, than Seventeen Thousand (\$17,000.00) Dollars. Mortgagor agrees on demand to execute note payable to said mortgagee or assigns evidencing such additional service.

And This Mortgage shall be void if such payment be made.

But in Case Default Be Made in payment of the principle or interest as provided in said promissory note (or any thereof) then the said mortgagee,



its agent, attorney, successors or assigns are, or the Sheriff of any County in which the above described property or any part thereof may be, is hereby empowered and authorized to sell the said goods and chattels, with all and every of the appurtenances, or any part thereof, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale and all costs of taking or holding said property or any part thereof, and reasonable attorney's fee, and the overplus, if any there be, shall be paid by the party making such sale to the said mortgagor, successors or assigns. The sale under the said power of sale shall be advertised by notice posted in five (5) public places in said County, one of which shall be posted at the designated place of sale at least five days prior to such sale, giving the time and place of sale and a description of the property to be sold. Such sale must be at public sale and the mortgagee may become a purchaser thereat.

It Is Further Agreed, That the said mortgagor, successors or assigns, shall have the right to remain in possession of the above described property until default be made herein by said mortgagor, provided expressly, however, that if default be made in the payment of the principal or interest, as provided in said promissory note or if, prior to the maturity of said indebtedness, said described property, or any part thereof, shall be attached, seized

or levied upon, by or at the instance of any creditor or creditors of said mortgagor, or claimed by any other person or persons as creditors, or for taxes, or otherwise, or in any manner, or if the said mortgagor or any other person or persons, shall remove, or attempt to remove, said property, or any part thereof from the said county, or shall conceal, make away with, sell, or in any manner dispose of said described property, or any part thereof or shall attempt so to do, or if the said mortgagee shall at any time consider the possession of said property, or any part thereof, essential to the security of the payment of said promissory note then and in such event, or in either of such events the said mortgagee, its agent or attorney, successors or assigns, or such Sheriff, shall have the right to the immediate possession of said described property and the whole or any part thereof, and shall have the right at its option to take and recover such possession from any person or persons having or claiming the same, with or without suit or process, and for that purpose may enter upon any premises where said property, or any part thereof, may be found, and may at its option, proceed and sell such property in the manner and to the purchaser as above provided, and all expenses paid and incurred by the mortgagee in so doing, together with interest thereon at the rate specified in the note above described shall be considered secured by this mortgage and shall be a lien on said property; and said mortgagee may, at its

option, proceed to sell such property, as above provided, and hold the proceeds of sale as security for the payment of said note. The exhibition of this mortgage, or a copy thereof, shall be sufficient proof that any person claiming to act for the mortgagee is duly made, constituted and appointed agent or attorney, as the case may be, to do whatsoever is herein authorized to be done by or on behalf of the mortgagee, its agent, attorney, successors or assigns.

It Is Further Agreed, in the event that this mortgage covers a crop, either cereal, roots or otherwise, either sown, planted or growing, or to be sown, planted or grown, or covers sheep or goats, that when the said crop hereby mortgaged is gathered, harvested or when the sheep or goats shall be clipped or shorn, the said mortgagee or its assigns shall be entitled to the immediate possession of such crop or clip, and the said mortgagee or its assigns, shall have the right to harvest, thresh, or in the event it be sheep or goats, clip or shear the same, and transport and haul such crop or clip from premises where the same have been grown and to sell and dispose of the same for the market price obtainable therefor; and that the cost and expense of such harvesting, threshing or clipping or shearing of animals, as the case may be, and of the hauling and transporting such products shall be borne and paid by said mortgagor and shall be covered by the lien of this mortgage; and that until such property is so sold and dis-

posed of by said mortgagee or its assigns the lien of this mortgage upon such property, wherever the same may be, shall continue and remain in full force and effect, it being agreed that any moneys received by the said mortgagee or its assigns upon the sale of such property, less the amount secured by these presents, shall be returned to said mortgagor, heirs or assigns. [981½]

In the event that cattle, if any, described or included herein are examined and found to be infected with Bang's disease, and sold in accordance with contract heretofore or hereafter entered into with the Secretary of Agriculture or of any state, municipality or other authority, or either or any of them, for the purpose of eradicating Bang's disease in cattle, the mortgagor covenants to notify the mortgagee immediately of the number of cattle infected and to be sold, and to remit any payments accruing to him from such cattle to the mortgagee to be applied to the reduction of the loss hereby derived; provided, however, that if the mortgagor and the mortgagee shall so agree, the mortgagor may be permitted to purchase, with the indemnity payment so received, sound cattle of same type, grade and approximate value as the cattle so sold, with the understanding that the cattle so to be purchased shall be subject to inspection and approval of the mortgagee or its agent; and that said cattle, shall, upon purchase being consummated, immediately be and become a



part of the security for the loan, or loans, hereby secured and in substitution of the cattle condemned and sold; the mortgage covenanting that he will execute any and all further instruments which may be necessary to effectuate this agreement. The mortgagee may, in his own discretion, make additionally available to the borrower for the purpose of replacement of cattle as hereinabove set forth, any funds which may be received from the sale of the diseased cattle when sold in the open market. In the event any mortgagor fails to account to the mortgagee for all of the amounts paid or received as indemnity and market sale price for cattle so condemned and sold or in any wise fails or neglects to keep and perform any of the agreements or covenants set forth hereinabove with respect to inspection, condemnation or sale of cattle infected with Bang's disease, then and in that event, at the discretion of the mortgagee, such failure or neglect on the part of the mortgagor shall constitute default under the provisions of this mortgage, and the mortgagee shall thereupon, at its option, be entitled to exercise all the rights which it would be entitled to enforce on a default under the terms of this mortgage. [99]

The Mortgagor hereby declares, warrants and represents to the mortgagee, that the mortgagor owns said property, and possesses lawful right and authority to sell, mortgage and dispose of the same, and warrants that the same is free and clear of all



liens and incumbrances, and the loan secured by this mortgage is obtained by virtue of these representations.

It Is Further Agreed, That the powers conferred by this mortgage are in addition to and not in substitution of the right of the mortgagee to foreclose this mortgage by a suit as in the case of a mortgage on real estate.

The giving of this mortgage is not intended, and shall not be construed, as waving, releasing or relinquishing any mortgages, liens or other security, if any, which may have heretofore been given to this mortgagee as security to the indebtedness, or any part thereof, herein described, but this mortgage is given as additional security for such indebtedness.

In Witness Whereof, the said mortgagor has hereunto set his hand and seal, the day and year in this instrument first above written.

[Seal]

SIMON DOUGLAS

State of Montana, County of Fergus—ss.

On this 28th day of December in the year 1934, before the undersigned, a Notary Public for the State of Montana, personally appeared Simon T. Douglas known to me to be the person (s) whose name (s) is (are) subscribed to the within instrument, and acknowledged to me that he (they) executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal on the day and year in this certificate first above written.

C. M. KELLY

Notary Public for the State of Montana, residing at Lewistown, Montana. My Commission expires December 13, 1936

[Seal]

State of Montana, County of Lewis and Clark—ss.

M. L. Lewis being first duly sworn deposes and says: That he is an officer, agent, attorney or other representative of Regional Agricultural Credit Corporation of Spokane, Washington, the corporation named in the foregoing mortgage as mortgagee, viz.: its Agent and makes this affidavit for and on behalf of said corporation. That the said mortgage is made in good faith to secure the amount named therein, and without any design to hinder, delay or defraud creditors.

M. L. LEWIS

Subscribed and sworn to before me this 19th day of December, 1934.

N. C. BROWN

Notary Public for the State of Montana, Residing at Helena, Montana. My Commission expires August 6, 1935

The undersigned mortgagor (s), described in the above mortgage, does (do) hereby acknowledge receipt of a correct and exact copy of such mortgage

with acknowledgements shown thereon surrendered to me (or us) without cost at the time of its execution.

SIMON DOUGLAS

Endorsement: Filed for record in the office of the County Clerk and Recorder of Fergus County, Montana, on the 28th day of December, 1934, at 4:00 o'clock P. M. of said day, records of said county.

[100]

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Thereafter, on January 11, 1940, a Stipulation for trial without jury, etc., was duly filed herein, being in the words and figures following, to-wit:

[101]

[Title of District Court and Cause.]

STIPULATION

The parties to the above entitled case hereby stipulate as follows:

1. That the above entitled case may be tried without the intervention of a jury.

2. That the setting of the above entitled case for trial by jury for December 27, 1939 may be vacated.

3. That subject to the approval of the court the rules of civil procedure for the District Courts of the United States shall be applicable to all further proceedings in this case.

4. That the contention set forth in the amended reply to the effect that the renewal mortgage dated December 19, 1934 had become effective and had

made non-effective the original mortgage dated December 27, 1933 is abandoned.

Dated December 19, 1939.

H. LEONARD DE KALB  
RAYMOND E. DOCKERY

Attorneys for Plaintiff

W. Q. VAN COTT  
D. EUGENE LIVINGSTON  
J. R. WINE

Attorneys for Defendant

[Endorsed]: Filed Jan. 11, 1940.

C. R. GARLOW, Clerk. [102]

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Thereafter, on May 28, 1940, a Transcript of Evidence and Proceedings at Trial was duly filed herein, being in the words and figures following, to wit: [103]

[Title of District Court and Cause.]

Present: Hon. Chas. N. Pray, Judge (Without a Jury).

H. LEONARD DeKALB, Esq., and  
RAYMOND E. DOCKERY, Esq.,

Attorneys for Plaintiff,

W. Q. VAN COTT, Esq.,  
D. EUGENE LIVINGSTON, Esq., and  
J. R. WINE, Esq.,

Attorneys for Defendant.

\* \* \* \* \*

The above entitled cause coming on for hearing before the Hon. Chas. N. Pray, Judge presiding,

sitting without a jury, on February 20, 1940, and the above named Counsel being present, the following proceedings were had and done: [106]

The Court: Gentlemen, are you ready for trial in Chapman vs. Regional Agricultural Credit Corporation?

Mr. DeKalb. We are.

Mr. Van Cott: Yes, your Honor.

The Court: I understand there was a stipulation to shorten the hearing considerably.

Mr. Wine: If the Court please, I would like to call the Court's attention to this Stipulation. There are four sections of this Stipulation.

Paragraph One, they stipulate that the above entitled case may be tried without the intervention of a jury.

Paragraph Two, that the setting of the above entitled case for trial by jury for December 27, 1939 may be vacated.

Paragraph Three, that subject to the approval of the Court the rules of civil procedure for the District Courts of the United States shall be applicable to all further proceedings in this case.

Paragraph Four, that the contention set forth in the Amended Reply to the effect that the renewal mortgage dated December 19, 1934 had become effective and had made non-effective the original mortgage dated December 27, 1933 is abandoned.

By this I take it only the parties may enter into it, which requires the Court's approval, and I submit that now, the third paragraph, and we proceed under that paragraph.



The Court: Very well, the Court will approve it.

Mr. Wine: In this connection, we filed in this case a plea in abatement. We now wish to withdraw that [107] plea and it may be stricken.

The Court: Very well; that leaves the case at issue so you are prepared to proceed with the trial?

Mr. Wine: Yes, your Honor.

Mr. DeKalb: May it please the Court, would you like to hear a very brief statement?

The Court: Yes, I think that would be in order right now.

(Whereupon Judge DeKalb made a brief outline of the case to the Court)

The Court: Very well, call your first witness.

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### HAL CLEMENT

being called as a witness for the Plaintiff, and being duly sworn, testified as follows:

#### Direct Examination

By Mr. DeKalb:

Q. You may state your name?

A. Hal Clement.

Q. Where do you reside?

A. Lewistown, Montana.

Q. How long have you lived there?

A. About seven years.

Q. What, if any, experience have you ever had with livestock, particularly sheep?

A. Well, I was practically raised on a sheep ranch, and later was an Inspector for the Production Credit Association of Spokane.

(Testimony of Hal Clement.)

Q. And having been raised on a ranch, let me ask you if you are familiar with the values of hay equipment, hay, oil cake, food for livestock, the necessary camp equipment that is usually used and employed in connection with handling sheep?

A. I would think so, with some limitations, if I may state those limitations. [108]

Q. Yes.

A. Any one ranching is not familiar and up to date with current prices on all occasions.

Q. No, that is true. Let me ask you if you know, and I will refer to it briefly, I will call this bunch of sheep the Douglas sheep. Let me ask you if you were familiar with the band of sheep known as the Douglas sheep that were ranged I think at the time of the sale in the Armells country?

A. I made an inspection of the Douglas sheep for the Production Credit Association in response to an application.

Q. You were at that time employed by them?

A. I was.

Q. And the record here shows that those sheep were sold under chattel mortgage on the fifth day of February, 1935. About how long before the sale of those sheep was your inspection made?

A. To the best of my recollection my inspection was made on or about the twenty-ninth. As I remember I made several trips out there. It has been so long since I don't know whether the formal inspection was made the second or third trip.

(Testimony of Hal Clement.)

Q. You think about the twenty-ninth of January?

A. Yes, that would not be far away from the actual time.

Q. The sale was held on the fifth. Were you at that time familiar with the values, call it market values, or what, of sheep of the character of this band of sheep in that vicinity at that time, were you?

A. I believe I was. I was supposed to be, at least.

Q. And, let me ask you Mr. Clement to give to the Court your [109] opinion as to the value of that band of sheep, enumerating them by sexes and age, etc., if you will do so, please?

Mr. Wine: For the purpose of the record, we object to any evidence of value with reference to the personal property referred to in the Amended Complaint and pleadings in this case upon the ground it is immaterial, irrelevant and incompetent to any issue involved in this case.

The Court: Overrule objection. Proceed.

Q. And if you need to do so, and have the memorandum which you made yourself, or a true copy of one you made yourself, if you need to refer to it, you may refer to that, but if you can testify from memory, let's have it?

A. Possibly I should state that I have refreshed my recollection from notes made at approximately that time. Using that as a basis, I will state that I

(Testimony of Hal Clement.)

value the sheep this way: Yearling ewes, \$6.50. This is per head basis. Two year old ewes, \$7.50; Three year old ewes, \$6.50; Four year old ewes, \$5.00; Five year old ewes, \$4.00, and sixes and over, \$3.00. There were some ewe lambs in there that I appraised at \$5.50, and some mixed lambs that were appraised at \$3.00; also some bucks at \$15.00.

Q. Now, in addition to the sheep, using that for a basis of the lambs and all, in addition to the sheep there were other equipment which is enumerated, the character of which is not in issue here, that was covered by the chattel mortgage, consisting of lambing tents, tepees, hay, oil cake and matters of that kind. Did you place a value upon that at that time, or do you have an opinion at this time as to its value? [110]

A. I didn't place a valuation on it, and I don't have any idea what the value was on that equipment.

Q. Would you say it did have some value in addition to the value of the sheep?

A. I can say there was some intrinsic value to the property.

Q. Do you know some of it was sold, if not all of it was sold at the sale?

A. Not as a matter of fact because I was not at the sale.

Q. That is a matter of hearsay with you, I take it. Now, do I understand you as expressing your opinion that at that time, at the time of your in-

(Testimony of Hal Clement.)

spection, on or about the twenty-ninth of January, your opinion as to values were as you have stated them?

A. Yes, those are the values I put on my report, and naturally those are the values I place on them.

### Cross Examination

By Mr. Van Cott:

Q. Mr. Clement, the document to which you have referred to refresh your recollection in regard to values, was the appraisal that you made at the Simon Douglas outfit for the purpose of being considered by the Production Credit Association in regard to a loan, is that true? A. That is right.

Q. The valuation you placed on them, and to which you have referred, was solely for that purpose? A. That is right.

Q. The opinion you have expressed here in regard to values is based solely upon the recollection you recorded in that document?

A. Yes sir.

Q. Isn't it a fact that there is considerable difference in [111] an appraisement for a production loan as compared with a cash value?

A. Well, now I have never made an appraisement for cash value. Production credit loans are made on a production basis.

Q. On a much more liberal basis than the cash appraisal?



(Testimony of Hal Clement.)

A. I am not in a position to say. I never made a cash appraisal.

Q. You never made a cash appraisal?

A. No sir, not for a sale.

Q. Isn't it a fact also that in making those appraisals for the purpose of a loan by the P. C. A. that you go according to a schedule of prices?

A. I never did. I use my own judgment. That is what we were supposed to do.

Q. You don't undertake to say or to express the opinion that these sheep on February fifth, 1935 could have been sold on a cash basis at the figures you have stated?

A. Will you repeat that?

Q. Read the question (question read)?

A. I don't attempt to make any statement as to that. I merely made the statement as to my appraisal prior to the sale.

Q. You are not undertaking to express any opinion what they could have been sold for on a cash basis on that date?      A. No, I am not.

### Redirect Examination

By Mr. DeKalb:

Q. You have placed this as the value of those sheep at that time?

Mr. Van Cott: That is objected to as leading?

[112]

The Court: It may be leading.

Mr. DeKalb: That is all.

Witness Excused.

## GEORGE YEAGER

being called as a witness for the Plaintiff, and being duly sworn, testified as follows:

## Direct Examination

By Mr. DeKalb:

Q. You may state your name, please?

A. George Yeager.

Q. Where do you reside?

A. Armells at the present time.

Q. That is in Fergus County?

A. Yes sir.

Q. What is your occupation?

A. Livestock business.

Q. How long have you been engaged in the livestock business?      A. All my life.

Q. That doesn't mean so much unless we know about your age. What is your age?

A. Forty-five.

Q. That would mean all your matured life?

A. Yes sir.

Q. You grew up, I take it, on a stock ranch?

A. Yes sir.

Q. Did you know the band of so-called Douglas sheep that were the subject of a chattel mortgage sale that took place on the fifth of February, 1935, are you familiar with this sheep?

A. Yes sir.

Q. May I ask you, if in your occupation as a livestock man you were acquainted and familiar with the values, market or otherwise, values of live-

(Testimony of George Yeager.)

stock of the character of the Douglas sheep at that time?      A. Yes sir. [113]

Q. You know of the death of Simon Douglas, occurring in December I think, 1934, and the sale that took place on the fifth of February, 1935. Let me ask you if you were interested in acquiring any of those sheep, speaking of it in a sense as embracing lambs ewes and wethers, etc., were you interested at that time in purchasing at this sale any of these sheep?

A. I was interested in buying the whole bunch.

Q. What, if any, investigation, specific investigation did you make, and examination, of this band of sheep with the idea in mind of becoming interested in purchasing the whole spread?

A. Well, I went out there twice and looked at them.

Q. Did you examine them sufficiently to determine in your own mind——?

A. Yes, I did.

Q. And to enable you to now express an opinion as to the value of those sheep at that time?

A. Yes sir.

Q. Let me ask you, what in your opinion, either splitting them up by putting a price on the ewes of different ages, on the wethers, and on the bucks, and on the younger ewes, do it as you like, split them up, or not, what is your opinion as to the value of those sheep at that time on or about the fifth day of February, 1935?

(Testimony of George Yeager.)

A. About twenty thousand dollars.

Q. And you didn't purchase any of them, did you, at the sale?      A. No, I did not.

Q. You might state to the Court briefly just why you did not?

A. Well, I had a deal with the Production Credit Association and I got turned down. [114]

Q. As I understand it, you were endeavoring to finance yourself so as to enable you to have the money with which to make the purchase, under your judgment as to values?      A. Yes sir.

Q. And that failed you, did it?

A. Yes sir.

Q. Now, in addition, having been brought up on a stock ranch, let me ask you in addition to these sheep you have knowledge and acquaintance with values of farm machinery, hay tools, hay, oil cake, horses, and other things which I won't take time to enumerate but which were offered at that sale and sold at that sale in addition to the sheep called camp equipment, are you familiar with them?

A. Yes sir.

Q. What in your opinion was the value of that?

A. Well, if I remember right, I believe I valued the machinery and the camp supplies at a thousand dollars.

Q. Was that your opinion of the value at that time?

A. I think that is what it was, yes.

(Testimony of George Yeager.)

Q. That would be your judgment on it at this time, on the values as they existed then, that is your judgment of the value? A. Yes.

Q. Did you include the horses in that valuation of the equipment? A. No, I did not.

Q. What value would you place upon them?

A. Well, I didn't see the horses.

Q. You didn't see them? A. No.

Q. You would not care to place any value on the horses?

A. No, I didn't see the horses.

### Cross Examination

By Mr. Van Cott:

Q. You stated that you placed a valuation of Twenty Thousand [115] Dollars. Do I understand that to be on the entire outfit?

A. No, that was for the sheep and machinery and the oil cake and the hay.

Q. That is, the livestock, the horses, machinery, oil cake and hay?

A. No, not the horses.

Q. Not the horses? A. No.

Q. Everything in the outfit except the horses?

A. Machinery and camp supplies and the hay and oil cake and the sheep.

Q. That is everything in the outfit except the horses?

A. Well, I don't know if there was anything else, or not. I couldn't tell you if there was any household goods, or not.



(Testimony of George Yeager.)

Q. Now, the place where you and your brothers live and operate a farm is in the same vicinity as where the Simon Douglas outfit was, is that true?

A. No.

Q. Where is it?

A. Our home place is near Glengarry.

Q. How far away is that?

A. Nine miles west of Lewistown.

Q. How many miles away from where the Simon Douglas outfit was?

A. Probably forty-five miles.

Q. What kind of a unit do you operate there?

A. Oh, it is wheat, cattle, horses.

Q. Any sheep?

A. Not under the name of Yeager Brothers.

Q. Well, under any name?

A. Yes, just George Yeager only; just under myself. I am [116]the only one running sheep.

Q. You run sheep over there? A. Yes sir.

Q. How many? A. Three thousand.

Q. At that time you were figuring on buying this outfit, the Simon Douglas outfit, you had feed for the Simon Douglas sheep, did you?

A. There is feed there.

Q. Where? A. On the horse ranch.

Q. On the Simon Douglas horse ranch?

A. Yes sir.

Q. When you call that the Simon Douglas horse ranch, it was not ever owned by him, was it?

A. No, he just had a lease on it.

(Testimony of George Yeager.)

Q. In order to operate in that locality you were dependent upon the whim of the lessor, were you not?

The Court: He would be depending upon the length of the lease.

Q. How long a lease did Douglas have on the horse ranch?

A. It ran until the first of May.

Q. Whether you would get the lease next season would depend whether you could make a deal with the lessor?

A. I would not be afraid I could not get another lease on it.

Q. Well, you had it to do, didn't you?

A. Yes sir.

Q. If your deal went through you were willing to borrow from the P. C. A. approximately Twenty Thousand Dollars for the purpose of making that deal, is that correct?

A. No, it would not run quite that high?

Q. How much was it, about Nineteen Thousand Dollars?

A. I think it was Nineteen Thousand with the stock, with the five per cent stock. [117]

Q. The deal was to borrow enough money to pay off the loan that was owing to the Regional Agricultural Credit Corporation of Spokane and to buy the five per cent stock that was necessary to be bought in order to get a loan from the P. C. A., is that right?

A. Yes sir.

(Testimony of George Yeager.)

Q. When you placed this valuation of Twenty Thousand Dollars on that outfit, that is what you mean you were willing to borrow that much money in order to take the outfit over?

A. No, I figured it was worth that and I thought it was a good buy.

Q. You were willing to borrow that much money and take over the outfit?

A. I never asked for that much money?

Q. What you really mean is, you considered the property was worth that much in cash?

A. Well, I was just buying it on a production basis.

Q. You were willing to borrow that?

A. I was going to buy on the run.

Q. Were you not going to put up any cash?

A. Yes.

Q. How much.      A. Two thousand dollars.

Q. Was that your cash or somebody else' cash?

A. Well, it was somebody else'.

Q. You were going to borrow it from somebody else?      A. Yes sir.

Q. All the money you were going to put into that was borrowed money?

A. No, I was putting in my equity in 1100 sheep besides. I had eleven or twelve hundred sheep besides that and I was figuring putting that in the pot too. [118]

(Testimony of George Yeager.)

Q. How much would your equity in those sheep

amount to?

A. Probably four thousand dollars.

Q. Going back to that lease, do you know that the lessor raised the rent on Douglas fifty per cent just the year before?

Mr. DeKalb: We object to that. It is outside the issues and not proper cross-examination.

The Court: I suppose he knew what the rental was because he was contemplating buying the outfit. He may state, if he knows.

Q. Did you know that?

A. I didn't know they had raised the rent.

Q. You didn't know the rent formerly had been twelve hundred dollars a season and the landlord demanded an increase of fifty per cent?

The Court: He said he didn't know. He has already answered the question.

Q. Were you present at the sale?

A. No, I was not.

Q. When did you last see the sheep prior to the sale?

A. I couldn't tell you but I think about three or four days before the sale.

Q. Can you tell the Court the description of the sheep that you say you placed the value on,—how many lambs?

A. I don't remember. There was around nineteen to two thousand head.

Q. Two thousand head?

A. I think so, yes.

(Testimony of George Yeager.)

Q. This valuation that you have given includes some two thousand head of lambs?

A. Yes sir.

Q. What next does it include? [119]

A. There was around eleven hundred three year old ewes.

A. There was around eleven hundred three year old ewes?      A. I think so.

Q. Eleven hundred?      A. Yes sir.

Q. What else?

A. Well, there was an older band there but I don't know how many was in that, I don't remember.

Q. You can't tell the Court what you place this valuation on?

A. I don't know how many head was in that band.

Q. I am asking you what the items are upon which you place the valuation of Twenty Thousand Dollars. Were there any yearlings?

A. I don't think so.

Q. No yearlings. Were there any two year olds?

A. I don't remember.

Q. You don't know whether there were any twos. You stated there were eleven hundred threes?

A. I think there was eleven hundred and eighty, I don't remember.

Q. How about fours?

A. Well, I couldn't tell you how many.



(Testimony of George Yeager.)

Q. You don't know whether there were any fours, or not? How many ewes over fours?

A. There was probably nine hundred of them. I don't remember how many there was in that band.

Q. What you call aged?

A. I think I would call them aged ewes, yes.

Q. How many bucks?

A. I don't remember.

Q. You don't know anything about the bucks. So this valuation, so far as the sheep are concerned, is based on two thousand lambs, eleven hundred three year old ewes, and [120] nine hundred to a thousand ewes over four years old, and nothing else?

A. And a carload of oil cake and hay.

Q. And that is all?

A. And the machinery.

Q. Anything else?

A. Not in this deal I was working up, no.

Q. What was the condition of those sheep?

A. Well, I would say they were in good winter condition.

Q. What have you to say as to the condition of their wool?      A. It was all right.

Q. Had the ewes been bred?      A. Yes.

Q. Well bred?

A. Well, I would say they was. Of course, the bucks were still running with them. The bucks were still running with the ewes.

(Testimony of George Yeager.)

Re-Direct Examination

By Mr. DeKalb:

Q. You haven't difficulty in recalling the details of this band, approximately how many sheep, using it in that sense, including lambs and everything, was in this band? A. Which band?

Q. In the Douglas band, the whole bunch?

A. Oh, probably forty-one or forty-two hundred.

Q. You had appraised them with the idea of acquiring them, if you could get the money?

A. Yes sir.

Q. And you placed those values upon them, and it has remained a matter of your memory?

A. Yes sir.

Q. You were familiar with values there at that time? A. Yes sir.

Witness Excused. [121]

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FRANK BIRKINBINE

being called as a witness for the Plaintiff, and being duly sworn, testified as follows:

Direct Examination

By Mr. DeKalb:

Q. You may state your name, please?

A. Frank Birkinbine.

Q. Where do you reside?

(Testimony of Frank Birkinbine.)

A. Great Falls.

Q. What is your occupation?

A. Stock buyer.

Q. That includes I take it all types of livestock?

A. Yes sir.

Q. Sheep, etc?      A. Yes sir.

Q. How long have been engaged in that occupation?

A. Ever since I was eighteen or twenty years old.

Q. And your age at the present time is what?

A. Forty-eight.

Q. May I ask you if you had anything to do along in the early days of February, 1935 with any of the sheep that had been acquired from the Douglas chattel mortgage sale?      A. I did.

Q. How many sheep and what character of sheep did you have to do with that had been acquired at that sale?

A. Well, I bought what is called aged sheep. I think the number in that band, about a thousand head of aged sheep.

Q. Were those mouthed?

A. Yes, they were.

Q. Were there any broken-mouthed or split-mouthed sheep?      A. Yes, there were.

Q. What would you say the percentage was?

A. Well, that is five years ago and I couldn't say exactly but based on my memory there was around better than a carload; better than two hun-

(Testimony of Frank Birkinbine.)

dred and fifty of them that were broken-mouthed.

[122]

Q. How many were acquired at that time you were interested in?

A. About a thousand head, may be a little more.

Q. How many of those were young?

A. Not any of them were really young. They were what you call graded and were broken and solid, the mouthed ones, that is, those five, six and seven years old.

Q. Taking those of that character at that time, may I ask you if you were familiar with values of sheep of that character in that vicinity at that time?

A. Yes sir.

Q. In your opinion what was the value per head of that bunch of sheep that had been so acquired at the Douglas sale?

A. I am pretty positive that I sold the solid mouthed of those at four dollars a head. I think that was a little high on them. I remember I had to sell them, I had to transport them from one town to another before I could dispose of the sheep but I did finally dispose of them.

Q. That was the broken-mouthed?

A. That was the solid mouthed.

Q. What did you dispose the broken-mouthed at?

A. I think right at two dollars.

Q. The younger stuff?

A. The younger stuff I didn't handle.

Q. Having been acquainted with those sheep

(Testimony of Frank Birkinbine.)

that were acquired, what value would you place on the younger stuff, based upon your knowledge of market conditions?

A. You know, what price I put on the sheep was the selling price. I have not checked that price offered me, my estimate of the value of the sheep, but if the solid mouthed was [123] selling at that time at four dollars, a younger one on that same basis would be worth right at seven dollars a yearling or twos and then your depreciation as they grow older.

Q. Would that be your opinion of the value of the young ones at that time?

A. Yes sir. You understand there is an expense in handling sheep, and we have to make a profit?

Q. That is usually ten cents a head?

A. We can't handle them and take a chance and pay for them at ten cents a head. The standard rule on a thousand is ten cents but some people get twenty-five cents.

Q. Those values are values that are or were current in the trade at that time?

A. Yes, what we were selling and trading sheep at.

Q. That is the value you placed upon them at that time?      A. Yes sir.

Q. In the case of young sheep, how far up the scale did you go?      A. Three year old ewe.

Q. You have already told us the number of old and the number of young in this band that you were interested in?      A. Yes sir.



(Testimony of Frank Birkinbine.)

Q. Now, do I understand there were 1085 of the old ewes containing some broken-mouthed, and how many of the young? To refresh your recollection, was there not 1283 I think of the young ewes?

Mr. Van Cott: I object to that, if the Court please, as mis-stating the witness's evidence, and as being leading.

The Court: You may inquire whether or not there [124] was not that number. Let him answer the question. Overrule.

A. I am not prepared to say. I didn't handle or have anything to do with young ewes. There was a band of them around that figure. There were no young ewes in the sheep I bought and sold and handled.

Q. Did you handle any of the young sheep acquired over there at the sale by Lingshire?

A. I didn't handle any of the young sheep, no.

### Cross Examination

By Mr. Van Cott:

Q. With whom did you deal on the purchase of sheep you have testified?

A. Johnson and Nepstad.

Q. Daily Johnson and O. A. Nepstad?

A. Yes sir.

Q. Where did you deal with them?

A. In Lewistown.

Q. On what date was it, if you know?

A. Well, now, it was the next day or the day after that of the sale.

(Testimony of Frank Birkinbine.)

Q. It was some time early in February, 1935?

A. Yes, right at the time of the sale.

Q. Exactly, what was the deal you made with them?

A. I bought this band of sheep, according to grade.

Q. What was the grade?

A. Solid-mouth and broken-mouths.

Q. You say there were about two hundred and fifty broken-mouthed? A. Right at that.

Q. About seven hundred and fifty solid-mouthed? A. Right at that.

Q. Are you able to inform the Court as to the ages of the sheep? A. No. [125]

Q. They may have been old?

A. They were old sheep. After a sheep gets four years old you can't tell the age.

Q. What was the deal you made with Daily Johnson and O. A. Nepstad? A. The deal?

Q. Yes.

A. I was to pay them a certain price.

Q. What was that price?

A. I am not sure of the price I arranged with Johnson.

Q. You are unable to inform the Court?

A. I know what we sold them for.

Q. Where did you sell them?

A. In Iowa.

Q. You didn't sell them in Montana?

A. No sir.

(Testimony of Frank Birkinbine.)

Q. You couldn't tell the Court anything about what you paid for them in Montana?

A. I could not.

Witness Excused.

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JOE C. KING

being called as a witness for the Plaintiff, and being duly sworn, testified as follows:

Direct Examination

By Mr. DeKalb:

Q. State your name, please.

A. Joe C. King.

Q. Where do you reside?

A. Lewistown, Montana.

Q. How long have you resided there?

A. I was born there.

Q. What familiarity have you with livestock?

A. Well, I was born on a livestock ranch, and have been around it all my life.

Q. Did the livestock include sheep?

A. Yes sir.

Q. Let me ask you if you are still engaged in ranching, [126] livestock ranching or other-wise?

A. Yes, I am running sheep, and I also deal in sheep.

Q. How long have you been a dealer in sheep?

A. Off and on for the last seven or eight years.

(Testimony of Joe C. King.)

Q. You were so dealing in sheep in 1935, were you?      A. Yes sir.

Q. Let me ask you if you knew a band of sheep known as the Douglas sheep which were sold at the chattel mortgage sale on the fifth of February, 1935?      A. I saw them prior to the sale.

Q. Do you know anything about the equipment and supplies which were on hand such as hay and oil cake and oats, etc.?      A. I do not.

Q. Do you know whether there was any of that?

A. I naturally assume there was but I didn't pay any attention to that.

Q. About how long before the sale that took place on the fifth day of February, 1935 did you examine the sheep?

A. Well, I would say it was some time the latter part of January, some time between the fifteenth and twenty-fifth; I can't definitely remember.

Q. When you made an inspection of those sheep at that time did you have any object in mind of acquiring any of them for yourself?

A. I had an eastern order for some of them.

Q. You did?      A. Yes sir.

Q. Some one who purported to know about the sheep, somebody that knew?

A. No, I told this party these sheep would be offered for sale and he wanted me to see them.

[127]

Q. When you saw this bunch of sheep were you interested in any particular the age or sex or kind of sheep?

(Testimony of Joe C. King.)

A. My order called for a good mouthed ewe and I went out to inspect them for condition.

Q. You saw their condition? A. Yes sir.

Q. Without mouthing them?

A. Yes, that is right.

Q. Were you in the court room and heard Mr. Birkinbine testify about the percentage of broken-mouths there were? A. I did.

Q. Were the ewes that you were interested in sound-mouthed, old mouthed?

A. They were good mouthed ewes.

Q. Good mouthed, were you able to place a value on those?

A. My client was willing to pay five dollars a head for good mouthed ewes.

Mr. Van Cott: I move to strike the answer as not responsive to the question.

The Court: We will let it stand for what it is worth.

Q. Would that be your opinion at the time of the value of the sound ewes?

Mr. Van Cott: I object to that as leading.

Mr. DeKalb: Withdraw the question.

Q. What would be your opinion as to the value, the reasonable value placed upon them at that time?

A. I figure any one that bought those sheep for that price would make some money on them.

Mr. Van Cott: I move to strike the answer as not responsive.

The Court: Sustain. [128]



(Testimony of Joe C. King.)

Q. Let us have your opinion. Would it be your opinion that would be the value, or what?

A. My opinion is that is the value of those sheep.

Q. Where do you draw the line between the expression, old ewes and young ewes?

A. We call a young ewe up until she is to and including a three year old.

Q. Is there usually any basis when you know the value of one age and one sex of sheep? There is usually some index by which that knowledge is fixed as to the knowledge of other values of other types of sheep, lambs, etc.?

A. Well, in my opinion a young ewe is worth from one dollar to three dollars a head more than a broken-mouthed ewe. A broken-mouthed is worth less than full-mouth ewe.

Q. You would say that was in line with current values there at that time, would you?

A. Yes sir.

Q. What age usually does this condition of broken-mouthed ewes come in?

A. That depends on the range conditions.

Q. Do I understand that placing a value of five dollars on the sound-mouth ewes gives an index of two to three dollars more than that in value for the young ewes?

A. One to three dollars.

(Testimony of Joe C. King.)

### Cross Examination

By Mr. Van Cott:

Q. That is, as I understand you, there is a differential between what you call young ewes and what you call old ewes of one to three dollars, is that correct?

A. No, I didn't say anything about old ewes. I spoke about good mouths and broken-mouths. [129]

Q. You would say there is a difference between broken-mouth ewes and sound mouth ewes?

A. Yes, up to one to three dollars, that is right.

Q. Ewes may have broken-mouths as early as two or three years old, if they happen to range in certain places, may they not?

A. That is right.

Q. And you may have sound-mouth ewes at seven or eight years old?      A. Yes sir.

Q. How long did you spend in that band of sheep before the sale?

A. I just drove around out there.

Q. How long were you out there?

A. It didn't take very long to look at the bunch of sheep.

Q. Well, how long?

A. I would not want to state; I don't remember.

Q. Were you there as long as a half hour?

A. Probably.

Q. Just about that?      A. Probably.

(Testimony of Joe C. King.)

Q. Did you get out of your car?

A. I did not.

Q. You didn't mouth a single sheep?

A. I did not.

Q. You didn't count a single sheep?

A. I did not.

Q. The order you say you had was for how many sheep?  
A. For solid-mouth.

Q. They had to be solid-mouth?

A. They had to be good mouth.

Q. And what age?

A. I can't tell the age of a good mouth ewe.

Q. I know but what age did your order call for?

A. Good mouth ewes.

Q. Could it have been for old ewes then?

A. Yes. [130]

Q. Or young ewes?  
A. That is right.

Q. You were free to offer five dollars a head regardless of age?

A. I probably didn't make myself clear. In other words, after a ewe gets a certain age, and she starts spreading she may have all eight teeth but she is not a good ewe.

Q. You have told the Court a ewe may have a solid mouth at seven or eight years?

A. A solid-mouthed ewe is not necessarily a good mouthed ewe.

Q. Might you find seven year old ewes that are good mouthed?  
A. No.

(Testimony of Joe C. King.)

Q. How old might they be and still be good mouthed?

A. I would say five years would be the oldest.

Q. According to your testimony, as I understand it, this order might be filled by buying a thousand five year old ewes, if their mouths were good?

A. That is right.

Q. Isn't it a fact, that during the fall of 1934 the Government drouth winter program was on and that thousands and thousands of sheep were sold to the Government for Two Dollars a head?

A. That is right.

Q. I mean five year old good mouthed ewes, don't you know that to be a fact?

A. Yes sir. May I ask you a question?

Q. I am not on the witness stand.

A. O. K.

Q. What had happened, if anything, since the fall of 1934 to up the price of five year old ewes from two dollars to any amount?

A. There was the wintering expense on those ewes up to February. That put an additional valuation on them, and they were closer to shearing and lambing. [131]

Q. How much additional was put on the five year old ewes on account of wintering and prospective breeding and lambing?

A. Two or three dollars.

Q. How much?

(Testimony of Joe C. King.)

A. Over and above your Government two dollar price I am speaking of.

Q. You told the Court the market value of five year old ewes in Fergus County in February, 1935 was five dollars a head, did you not?

A. It was my market value for a thousand head.

Q. Well, you had an order for that?

A. Yes.

Q. You would not say that is the market value?

A. There was a market for that many ewes, and that was the market value on that many head.

Q. Where did the order come from?

A. From Iowa.

Q. Laying that aside, did you have an opinion as to the market value of five year old ewes in Fergus County in Montana in February, 1935?

A. I did not.

Q. You didn't have any opinion?

A. I have an opinion in this way. I had a market for that many at that price.

Q. I am asking you if you had any opinion as to the market value of five year old ewes at that time and place?

A. At what time and place?

Q. February, 1935, Fergus County, Montana?

A. I still don't understand your question.

Q. Did you have any opinion as to the market value of five year old good mouthed ewes in Fergus County, Montana in February, 1935?



(Testimony of Joe C. King.)

A. That depends on how many you wanted to sell all at once. [132] I had an opinion on a thousand head.

Q. The opinion you had on the thousand head was based on the fact that somebody gave you an order from Iowa? A. Yes sir.

Q. Have you aside from that any opinion as to the market value of that class of ewes at that time and place?

A. That is the only opinion I could have, what I could get for them.

Q. Is your answer—no, you had no opinion?

The Court: He has answered your question.

Q. Have you any opinion?

The Court: That is his opinion as to the market value, what you would get for them at that time, that character of sheep.

Q. You didn't attend the sale?

A. I did not.

Q. You didn't make any bid at the sale through any agent? A. I did not.

Q. You were how many miles away from the sale?

A. I was in Lewistown. I don't know how many miles that is exactly.

Q. You have been in the sheep business as you say for many years. Are you familiar with a rule of thumb method that sheep men have of placing values upon ewes by reference to the price of lambs?

(Testimony of Joe C. King.)

A. I generally figure a yearling ewe in the fall is per head what a lamb is worth per pound, a ewe lamb.

Q. In other words, if in the fall the price of lambs we will say is four cents a pound, then you consider that the market value of a yearling ewe would be four dollars a head? [133]

A. Roughly, yes. There is a difference in quality, of course.

Q. Would that be true of a two year old ewe?

A. I would consider a two year old worth one dollar a head more.

Q. What about a three year old?

A. A three,—she is worth about the same as a yearling.

Q. How about a four year old and over?

A. The price scales down there.

Q. To about half the value of a yearling, is that right?

A. It depends on how old you want to go.

Q. Well, generally?

A. Yes, they scale down.

Q. Do you know what the market price of lambs in the fall of 1934 was?      A. Yes.

Q. What was it?

A. There was not much of a market. Most lambs went out on a feeder contract.

Q. They were selling for about four or four and a half cents a pound, were they not?

A. Yes sir.

(Testimony of Joe C. King.)

Q. Applying your rule of the thumb formula, that would make the market value of yearling ewes in the fall about four or four fifty?

A. Yes sir.

Q. And two year old ewes about five to five fifty? A. Yes sir.

Q. And three year old ewes four to four fifty?

A. The same price as a yearling.

Q. The price of old ewes about four or four fifty?

A. Uncle Sam bought them at two dollars a head.

Q. All the ewes? A. That is right.

Q. What was the condition of the sheep you saw out there [134]

Q. What are the various classifications for sheep, other than choice, good, fair, poor and very poor, is that about right?

A. Put medium in there.

Q. These you say were fair?

A. Yes sir.

Q. As to flesh? A. Yes sir.

Q. How were they as to wool?

A. They were all right as to wool, so far as I could see; they looked all right.

Q. Had they been bred?

A. I suppose so, yes.

Q. Well, do you know?

A. I don't know, no.

Q. You are unable to tell the Court how many, if any, had been bred which were there in the band?

(Testimony of Joe C. King.)

A. I am not.

Q. You are not able to? A. No.

Q. Would you have to get out and mouth them and count them for that?

A. That is right.

Q. That would have taken you a day or more, would it not? A. Yes sir.

### Re-Direct Examination

By Mr. DeKalb:

Q. You can tell approximately from looking at a band of sheep about how many there are, can you not? A. Yes sir.

Q. In regard to the Government price that Mr. Van Cott has mentioned, during the fall of 1934, were those purchases made because of shortage of grass? A. Drouth conditions mostly.

Q. Those that had feed, was there a different price?

A. The Government didn't buy any ewes in counties that had feed. [135]

Q. The Douglas sheep, they were kept on forage and pasture at that time, were they?

A. Yes sir.

Q. I observed once during your cross-examination there was a question you wanted to ask; was it anything you had in mind in connection with the Government purchases? Is there anything you can add in explanation here that will throw light upon this matter?

(Testimony of Joe C. King.)

A. I don't remember what the item was now.

Q. All right. It was developed on cross-examination that you did not attend the sale. For what reason?

A. Well, I happened to be, unfortunately, a witness in an automobile accident case and that case came up that same day and I was subpoenaed in court at Lewistown.

Q. You make a habit of obeying subpoenas, do you?

A. It says something on them that you have to.

Q. The Courts say it has to be done?

A. That is right.

#### Re-Cross Examination

By Mr. Van Cott:

Q. You couldn't send an agent out to make a bid for you?

A. No, those sheep had to be mouthed as they were bid for sale in the individual bunches, and I wanted to do that on this particular order.

Q. When were you subpoenaed?

A. I don't remember.

Q. With reference to the date of the sale?

A. It was on the same day.

Q. You were subpoenaed that very day?

A. I was subpoenaed that very day.

Q. Except for that you had intended to go to the sale?      A. That is right. [136]



(Testimony of Joe C. King.)

Q. How could you have moved that herd of sheep that very day we will say?

A. It would be quite a job.

Q. You couldn't do it, could you?

A. I could have bought them accordingly.

Q. Counsel ask you if you could tell about how many sheep there are in a herd by looking at it, and you said you could, generally. You can't tell anything about their ages by looking at them, can you?

A. Not exactly. You can tell whether they are old or young by looking at them.

Q. You can't tell how many there are by years, can you?      A. I should say not.

### Re-Direct Examination

By Mr. DeKalb:

Q. About how many, in your opinion, would you say there were in this band you saw there?

A. I would say between eleven and twelve hundred in this band I drove around.

Witness Excused.

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Mr. DeKalb: I think that about concludes the evidence the plaintiff will submit on the matter of values. If I am not out of order in suggesting a short recess, we will check our evidence and see if we have anything further.

The Court: Well, it is nearly noon now and we will take a recess until one-thirty.

(Whereupon court adjourned until 1:30 P. M.) [137]

Afternoon Session: 1:30 P. M.

Mr. DeKalb: The plaintiff rests his case in chief.

The Court: Very well.

Mr. Van Cott: Judge DeKalb has been kind enough to agree he would stipulate certain facts. I believe, Judge DeKalb, you will stipulate that the stock of the defendant corporation at the time of the matters referred to in the pleadings in this case was owned by the Government of the United States?

Mr. DeKalb: Yes, we will so stipulate. We rely upon Counsel that it is a provable fact.

Mr. Van Cott: We do make that admission, your Honor. Mark this as an exhibit. The document marked for identification, Defendant's Exhibit "1", is a certified copy of the return of sale, certified to by the County Clerk and Recorder of Fergus County.

Mr. DeKalb: That is like the one exhibited in the Complaint?

Mr. Van Cott: Precisely the same. We offer Exhibit "1" in evidence.

Mr. DeKalb: There is no objection, except as to its relevancy and its materiality; to that, we object.

The Court: Very well, let it be received in evidence.

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DEFENDANT'S EXHIBIT 1  
NOTICE OF SALE UNDER CHATTEL  
MORTGAGE FORECLOSURE

Notice is hereby given that whereas default has occurred in the conditions of that certain chattel mortgage executed by Simon Douglas of Fergus and Petroleum Counties, Montana, Mortgagor, to Regional Agricultural Credit Corporation of Spokane, Washington, Mortgagee, which said mortgage bears date of 27th day of December, 1933, and was filed in the office of the County Clerk and Recorder of Fergus County, State of Montana, on the 8th day of January, 1934, Number 926240, and also filed in the office of the County Clerk and Recorder of Petroleum County, State of Montana, on the 9th day of January, 1934, Number 7222, by reason of the failure of said mortgagor to pay the debt secured thereby;

And whereas there is now due and unpaid on said indebtedness to the said mortgagee the sum of \$16.-78¢ 92:

Now therefore, the property described in said mortgage, to-wit:

All sheep and horses of every kind, character and description owned by the mortgagor, including:

813 ewes one year old  
300 ewes two years old  
2400 ewes three, four and five years old  
630 ewes six years old  
100 ewes, aged  
586 ewe lambs  
123 wethers  
98 bucks

All above sheep marked Z with paint.

12 work horses  
10 saddle horses

Also: 290 tons of hay and all other hay, straw, forage and other livestock feed now owned or hereafter acquired by said mortgagor;

Also: All increase of like kind or progeny, also the wool of animals described above;

Also: All wagons, horses, trucks, automobiles, camp outfits, saddles, harnesses, mowers, hay rakes, stackers, loaders, and other similar ranch or farm machinery;

Also: All grazing or right of way privileges, permits or agreements; or as much thereof as may be necessary, will be sold pursuant to the power of sale in said mortgage contained, which has become operative, and to the statute in such case made and provided, at public sale to the highest bidder for cash on the 5th day of February, 1935, at 2 o'clock P. M. of said day at the ranch of the mortgagor, located 14 miles Northeast from Armells, County of Fergus,

State of Montana, to satisfy the debt secured by said mortgage and the costs and expenses of whatever nature, of these foreclosure proceedings.

Dated at Lewistown, Montana, this 28th day of January, 1935.

REGIONAL AGRICULTURAL  
CREDIT CORPORATION OF  
SPOKANE, WASHINGTON  
By EDGAR C. COOPER,  
Agent

(Marked Exhibit "A" in ink)

MORTGAGEE'S RETURN OF SALE UNDER  
CHATTEL MORTGAGE FORECLOSURE

State of Montana,  
County of Fergus—ss.

Edgar C. Cooper, being first duly sworn upon oath deposes and says:

That he is now and for more than ninety days past has been the duly appointed and acting agent of the Regional Agricultural Credit Corporation of Spokane, Wash., having a branch office located at Helena, Montana:

That pursuant to instructions received from said Regional Agricultural Credit Corporation of Spokane, Washington, the mortgagee named in that said chattel mortgage executed by Simon Douglas of Fergus and Petroleum Counties, on the 27th day of December, 1933, which said mortgage was duly filed



in the office of the County Clerk and Recorder of Petroleum County, on the 9th day of January, 1934, and being No. 7222 of the chattel mortgage records on file in the office of said County Clerk, and pursuant to the power of sale contained in said chattel mortgage, took into possession the personal property described in said chattel mortgage, and proceeded in accordance therewith to sell the property, and notice of sale was posted for the 5th day of February, 1935, at the hour of 2 o'clock P. M. at the ranch of the mortgagor, located 14 miles northeast from Armells in said Fergus County, Montana, and on the 28th day of January, 1935 posted five notices of said sale, a copy of said notice being hereunto attached and marked Exhibit "A", in five public places in said Fergus County, Montana, one of said notices being posted at the designated place of sale; one of said notices being posted at the door of garage at horse ranch; one of said notices being posted on a barn at Fergus near road; one of said notices being posted at building next to post office at Hilger, one of said notices being posted at Court House, Lewistown; all in Fergus County, Montana.

That on the 5th day of February, 1935, at the hour of 2 o'clock P. M. at the above mentioned ranch of the mortgagor in said County, the undersigned, proceeded to sell, and did sell at public auction to the highest bidder for cash, the said property described in said chattel mortgage; the property so sold, the purchaser and the price paid therefore being as follows, to wit:

Daley Johnson: 1934 ewe lambs & few wethers @ \$4.10	1453 head	\$5957.50
O. A. Nepstad: Old band of ewes @ \$2.25	1080 head	\$2430.00
H. Lingshire: Young band of ewes @ \$3.40	1237 head	\$4205.80
Matt Wildschultz: 21 head of horses		860.00
Pergus Ranch Co. 308 sacks molasses cake @ \$1.30 per sack		400.40
Tom Wight: 236 cut back lambs and ewes; some old bucks		110.00
Mike Mackler: Machinery, tools, etc., as follows:		
1 Ford coupe, small tools, 3 shovels, 2 spades, 2 iron bars, 2 hand saws, 2 cross cut saws, 1 vice, 1 anvil, 1 square, 3 log chains, 2 sheep hooks, forge, 5 axes, 1 hand rake, 1 pitch fork, 7 lanterns, 2 pack saddles, 4 sets harness, 1 potato cultivator, 1 snow plow, 1 power wood saw, 1 Twin City Tractor, 1 potato planter, 2 bull rakes, 1 hay rake, 1 hay stacker, 3 sheep wagons, 2 mowers, 2 bob sleds, 2 hay racks, 1 truck wagon, 2 wagons, 1 two wheel cart, 4 pack saddle bags, 2 saddles, 1 sloop, 40 tepee tents, 3 lambing tents, 15 panels, 35 sheep pelts, 30 small panels		435.00
H. R. Cameron: 46 tons old hay, very poor @ \$2.10		96.60
Tom Wight: 800 bu. oats @ \$1.50		12.00
J. A. Robinson Trustee: oats, hay and Blue Joint, for \$4.25 T.		
90 tons later resold to D. G. Disbrow for \$5.50		495.00
		<hr/>
		15,002.10

The purchasers being the above parties, and the price paid therefor being the sum of fifteen thousand two and 10/100 dollars (\$15,002.10).

That the proceeds of said sale were paid to the mortgagee, whose receipt therefore, marked Exhibit "B" is hereto attached, thereby referred to and by this reference made a part hereof.

EDGAR C. COOPER

Subscribed and sworn to before me this 6th day of Feb. 1935.

J. A. ROBINSON

Notary Public for the State of Montana. Residing at Helena. My Commission expires 12-26-36.

(Notarial Seal)

Exhibit "B"

Statement of Sale under Chattel Mortgage Foreclosure, February 5, 1935.

---

REGIONAL AGRICULTURAL CREDIT CORPORATION OF SPOKANE, WASHINGTON

Mortgagee,

vs.

SIMON DOUGLAS,

Mortgagor

Posting notices, seizure, caring for, and taking property to place of sale.....	\$ 306.82
Filing return of sale.....	1.00
	<hr/>
Total Expenses of Sale.....	\$ 307.82
Total sale proceeds.....	15,002.10
Less expenses of sale.....	307.82
	<hr/>
Net Proceeds of Sale.....	\$14,694.28

Disposition made of proceeds of sale:

The net proceeds of said mortgage sale, to-wit \$14,694.28, were paid to RACC of Spokane, Washington, and credited on the mortgage obligation owing to it by said mortgagor. Said mortgagor, after receiving credit for said net proceeds of said sale, owes a balance of \$1694.64 to said RACC of Spokane, Washington, besides interest.

---

Mr. Van Cott: Defendant's Exhibit "2" is the note that was signed by Simon Douglas.

Mr. DeKalb: It is like the one in the pleading?

Mr. Van Cott: It is precisely the same.

Mr. DeKalb: No objection. [138]

Mr. Van Cott: We offer it in evidence.

The Court: Let it be received in evidence.





December 15, 1934.

No. 124.

\$7,000.00

1934

Helena, Montana December 27, 1934.

December 15, 1934. - - - - - after date, for value received, we and each of us, jointly and severally, promise to pay to the order of the REGIONAL AGRICULTURAL CREDIT CORPORATION OF SPOKANE, WASHINGTON, at its office in the City of Helena, State of Montana

SEVENTEEN THOUSAND and no/100 . . . . . Dollars.

with interest at the rate of Six and One-half (6½) per cent per annum from date hereof, payable at maturity. In the event this note is placed after maturity in the hands of an attorney for collection or suit is brought on the same, or any portion thereof, we and each of us, jointly and severally, further agree to pay such reasonable attorney's fees and costs of collection as may be permitted by law to be charged, and to execute and consent to payment, demand, protest, and notice of non-payment thereof, and all defenses on the ground of any extension of the time of payment that may be given by the holder or holders to them or either of them.

Address Armells, Montana.

Case # 1237 - Chapman vs Ry and Agricultural Credit Corporation

Free Feb 20 1935

Simon Douglas

I (we) hereby guarantee payment of this note, or any portion thereof, up to the enforcement of this guarantee, including reasonable attorney's fees, and I (we) waive pre-comment, protest, demand, and notice of every kind, and out notice to me (us).

DATE	INTEREST		PRINCIPAL	
	Amount	Paid	Payments	Balance
Oct 21 '34	\$			\$ 16,000 -
Nov 10 - 13 '34				152.78 05
Dec 15 '34				1447.3 39
Dec 27 '34				1396.2 91
Dec 31 '34				1256.2 47
2-11-35			97.00	1356.2 47
2-14-35			661.81	6813.66
2-15-35			945.00	5868.66
2-15-35			96.60	5772.06
2-15-35			60.38	5711.68
2-15-35			63.02	5648.66







Mr. Van Cott: Number "3" is the original chattel mortgage, dated December 27, 1933, from Simon Douglas to the defendant.

Mr. DeKalb: It is the same as the exhibit in the pleadings?

Mr. Van Cott: Yes, that is correct, and we offer Defendant's Exhibit "3" in evidence.

Mr. DeKalb: No objection, except on the ground of its materiality.

The Court: Let it be received in evidence.

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### DEFENDANT'S EXHIBIT NO. 3

A. No. 12806.

L. No. 9156.

### CHATTEL MORTGAGE

This Mortgage, made the 27th day of December in the year 1933 by Simon Douglas, (whose post-office address is Arnells, State of Montana), mortgagor, to Regional Agricultural Credit Corporation of Spokane, Washington, (maintaining a branch at Helena, Montana) mortgagee:

Witnesseth: That for a valuable consideration, to-wit: a loan or loans of money, the mortgagor mortgages to the mortgagee the following described personal property situated, at the time of the execution of this mortgage, in the County (or Counties) of Fergus and Petroleum, State of Montana, to-wit:



All sheep and horses of every kind, character, and description owned by the mortgagor, including:

813 ewes one year old  
300 ewes two years old  
2400 ewes three, four and five years old  
630 ewes six years old  
100 ewes, aged  
586 ewe lambs  
123 wethers  
98 bucks

---

5050

All above sheep marked Z with paint.

12 work horses  
10 saddle horses

Also: 290 tons of hay and all other hay, straw, forage and other livestock feed now owned or hereafter acquired by said mortgagor.

The marks and brands used to describe the livestock are holding marks and brands and carry the title although said livestock may have other marks and brands. This mortgage is intended to include and there is included herein all increase of like kind or progeny, also the wool of animals described herein from year to year during the life of the mortgage.

There is also included herein and mortgaged hereby all wagons, horses, trucks, automobiles, camp outfits, saddles, harnesses, mowers, hay rakes, stack-

ers, loaders, and other similar ranch or farm machinery. Also all water, grazing or right of way privileges, permits or agreements. There is further mortgaged and included herein all hay, straw, range, forage and other livestock feed acquired by harvest, purchase or otherwise during the life of this mortgage provided, however, such livestock feed may be used solely for the purpose of feeding the livestock mortgaged herein and for no other purpose. It is understood, agreed and covenanted that this mortgage shall and it does mortgage all of the property covered by specific or general description herein of the kind or character referred to in any manner acquired by the mortgagor during the life of this mortgage, unless expressly excepted in the typewritten portion hereof. While exchanges or substitutions are covered by this mortgage, none shall be permitted except by written consent of the mortgagee in each separate instance. The mortgagee and/or any holder of this mortgage to have the right to at all times examine and check all property intended to be mortgaged hereunder.

This mortgage is given as security for the payment to the Regional Agricultural Credit Corporation of Spokane, Washington, at its office in the city of Helena, State of Montana, of the sum of Seventeen Thousand (\$17,000.00) Dollars now loaned to the mortgagor, according to the terms of mortgagor's promissory note (s), bearing even date herewith, payable to the order of the mortgagee, and described as follows: one note for \$17,000.00,

payable December 15, 1934 after date, one note for \$....., payable ..... after date, said note (s) being for value received, and to bear interest at the rate of —6½— per cent per annum from date until paid, interest payable at maturity.

The makers, endorsers and guarantors of said note severally agree to pay an attorney fee in case payments shall not be made at maturity and the makers, endorsers and guarantors of said note severally waive presentment for payment, demand, protest, and notice of non payment thereof and all defenses on the ground of any extension of the time of payment that may be given by the holder or holders to them or either of them. The endorsers and guarantors also severally consent to any extension of time and substitution of collateral.

This Mortgage is also security for such further and additional sums of money as may from time to time, during the life of this instrument, but at the discretion of the mortgagee, be advanced and loaned by said mortgagee or assigns, to said mortgagor, together with the interest thereon, which said future advances are now in contemplation and when made, are to be evidenced by a note from said mortgagor to said mortgagee or assigns, and are to be as fully secured hereby, as though the same were specifically described and set forth herein, but for no greater additional amount, however, than Twenty Thousand (\$20,000.00) Dollars.

And this Mortgage shall be void if such payment be made.

But in case default be made in payment of the principal or interest as provided in said promissory note (or any thereof) then the said mortgagee, its agent, attorney, successors or assigns are, or the Sheriff of any County in which the above described property or any part thereof may be, is hereby empowered and authorized to sell the said goods and chattels, with all and every of the appurtenances, or any part thereof, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale and all costs of taking or holding said property or any part thereof, and reasonable attorney's fee, and the overplus, if any there be, shall be paid by the party making such sale to the said mortgagor, successors or assigns. The sale under the said power of sale shall be advertised by notice posted in five (5) public places in said County, one of which shall be posted at the designated place of sale at least five days prior to such sale, giving the time and place of sale and a description of the property to be sold. Such sale must be at public sale and the mortgagee may become a purchaser thereat.

It Is Further Agreed, That the said mortgagor, successors or assigns, shall have the right to remain in possession of the above described property until default be made herein by said mortgagor, provided expressly, however, that if default be made in the payment of the principal or interest, as provided in said promissory note (s) or if, prior to the ma-



turity of said indebtedness, said described property, or any part thereof, shall be attached, seized or levied upon, by or at the instance of any creditor or creditors of said mortgagor, or claimed by any other person or persons as creditors, or for taxes, or otherwise, or in any manner, or if the said mortgagor or any other person or persons, shall remove, or attempt to remove, said property, or any part thereof from the said county, or shall conceal, make away with, sell, or in any manner dispose of said described property, or any part thereof or shall attempt so to do, or if the said mortgagee shall at any time consider the possession of said property, or any part thereof, essential to the security of the payment of said promissory note (s) then and in such event, or in either of such events the said mortgagee, its agent or attorney, successors or assigns, or such Sheriff, shall have the right to the immediate possession of said described property and the whole or any part thereof, and shall have the right at its option to take and recover such possession from any person or persons having or claiming the same, with or without suit or process, and for that purpose may enter upon any premises where said property, or any part thereof, may be found, and may at its option, proceed and sell such property in the manner and to the purchaser as above provided, and hold the proceeds of sale as security for the payment of said note. The exhibition of this mortgage, or a copy thereof, shall be sufficient proof that any



person claiming to act for the mortgagee is duly made, constituted and appointed agent or attorney, as the case may be, to do whatsoever is herein authorized to be done by or on behalf of the mortgagee, its agent, attorney, successors or assigns.

It Is Further Agreed, in the event that this mortgage covers a crop, either cereal, roots or otherwise, either sown, planted or growing, or to be sown, planted or grown, or covers sheep or goats, that when the said crop hereby mortgaged is gathered, harvested or when the sheep or goats shall be clipped or shorn, the said mortgagee or its assigns shall be entitled to the immediate possession of such crop or clip, and the said mortgagee or its assigns, shall have the right to harvest, thresh, or in the event it be sheep or goats, clip or shear the same, and transport and haul such crop or clip from premises where the same have been grown and to sell and dispose of the same for the market price obtainable therefor; and that the cost and expense of such harvesting, threshing or clipping or shearing of animals, as the case may be, and of the hauling and transporting such products shall be borne and paid by said mortgagor and shall be covered by the lien of this mortgage; and that until such property is so sold and disposed of by said mortgagee or its assigns the lien of this mortgage upon such property, wherever the same may be, shall continue and remain in full force and effect, it being agreed that any moneys received by the said mortgagee or its

assigns upon the sale of such property, less the amount secured by these presents, shall be returned to said mortgagor, heirs or assigns.

The Mortgagor hereby declares, warrants and represents to the mortgagee, that the mortgagor owns said property, and possesses lawful right and authority to sell, mortgage and dispose of the same, and warrants that the same is free and clear of all liens and incumbrances, and the loan secured by this mortgage is obtained by virtue of these representations.

It Is Further Agreed, That the powers conferred by this mortgage are in addition to and not in substitution of the right of the mortgagee to foreclose this mortgage by a suit as in the case of a mortgage on real estate.

The giving of this mortgage is not intended, and shall not be construed, as waiving, releasing or relinquishing any mortgages, liens or other security, if any, which may have heretofore been given to this mortgagee as security to the indebtedness, or any part thereof, herein described, but this mortgage is given as additional security for such indebtedness.

Words used herein in the masculine gender include the feminine and neuter, and the singular number includes the plural and the plural the singular.

The word "mortgagor" whenever herein used means "mortgagors" if there be more than one mortgagor; and where the word "mortgagee" is

used herein it shall include the successors and assigns of the mortgagee.

In Witness Whereof, the said mortgagor hereunto affixes the signature and seal of said mortgagor, the day and year in this instrument first above written.

(Seal)

SIMON DOUGLAS

State of Montana,  
County of Fergus—ss.

On this 6th day of January in the year 1934, before the undersigned, a Notary Public for the State of Montana, personally appeared Simon Douglas known to me to be the person (s) whose name (s) is (are) subscribed to the within instrument, and acknowledged to me that he (they) executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal on the day and year in this certificate first above written.

C. M. KELLY

Notary Public for the State of Montana, residing  
at Lewistown. My Commission expires Dec.  
13, 1936.

State of Montana,  
County of Lewis and Clark—ss.

Wallace H. Vennekolt, being first duly sworn deposes and says: That he is an officer, agent, attorney or other representative of Regional Agricultural

Credit Corporation of Spokane, Washington, the corporation named in the foregoing mortgage as mortgagee, viz: its Agent and makes this affidavit for and on behalf of said corporation. That the said mortgage is made in good faith to secure the amount named therein, and without any design to hinder, delay or defraud creditors.

WALLACE H. VENNEKOLT

Subscribed and sworn to before me this 27th day of December 1933.

MARGARET MacDONALD

Notary Public for the State of Montana, residing at Helena, Montana. My Commission expires October 28, 1936.

(Notarial Seal)

The undersigned mortgagor, described in the above mortgage, does hereby acknowledge receipt of a correct and exact copy of such mortgage with acknowledgments shown thereon surrendered to me or us without cost at the time of its execution.

SIMON DOUGLAS

96240

316984

CERTIFIED COPY

No.....

CHATTEL MORTGAGE

SIMON DOUGLAS

—To—

REGIONAL AGRICULTURAL CREDIT  
CORPORATION OF SPOKANE,  
WASHINGTON

Helena Branch, Helena, Montana

State of Montana,  
County of Fergus—ss.

Filed on the .....day of Jan. 8, 1934, at  
4:55 o'clock P. M.

ED. DENNETT

County Recorder.

By DELIA C. MARSHALL

Deputy Recorder.

To County Recorder: In certifying please use  
printed form on reverse side hereof.

CERTIFICATE

State of Montana,  
County of Fergus—ss.

The undersigned duly elected and acting County  
Clerk and Ex Officio Recorder for the above de-



scribed county does hereby certify that the foregoing is a full, true and correct copy of the original chattel mortgage now on file in this office No. 96240 of the chattel mortgage files of this office. The same being a chattel mortgage given by Simon Douglas to the Regional Agricultural Credit Corporation of Spokane, Washington.

In Witness Whereof, I hereunto set my hand and affixed the seal of said county this 9th day of January A. D. 1934.

ED. DENNETT

County Clerk and Ex Officio Recorder.

By DELIA C. MARSHALL

Deputy.

---

Mr. Van Cott: May it be stipulated that the amount owing on the indebtedness from Simon Douglas to the defendant after the sale was \$1385.01?

Mr. DeKalb: That may be so stipulated.

The Court: Very well, let the record so show.

---

H. H. PIGOTT

being called as a witness for the defendant, and being duly sworn, testified as follows:

(Testimony of H. H. Pigott.)

Direct Examination

By Mr. Van Cott:

Q. Will you state your name?

A. H. H. Pigott.

Q. Where do you reside? A. Helena.

Q. In 1934 and 1935 what was your connection with the Regional Agricultural Credit Corporation of Spokane?

A. I was Manager of the Helena branch up to the first of 1935, and afterwards Manager of the Corporation.

Q. The handling of the loan and mortgage of Simon Douglas was under your charge and supervision, was it? A. Yes sir. [139]

Q. And were you familiar generally with the condition of that loan in the winter of 1934 and early in 1935? A. Yes sir.

Q. What was its condition?

A. Not very good.

Q. When you were informed of the death of Simon Douglas which I may say the record shows occurred on January 12, 1935, what did you do in regard to the care of the mortgaged sheep?

A. We directed our Inspector, as I remember it, to see they were properly fed, and advanced whatever funds were necessary for their care.

Q. In other words, you took over the responsibility for financing the care of the sheep?

A. Yes sir.

(Testimony of H. H. Pigott.)

Q. After the death of Simon Douglas?

A. There were no funds for that purpose so we had to do it.

Q. Did you communicate with the heirs of Simon Douglas respecting the situation?

A. I can't remember whether we communicated with him, or not, by wire, or otherwise, but he came to Helena to see us.

Q. That is Max Worthington? A. Yes sir.

Q. Max Worthington, the husband of Dorothy Worthington, the heir of Simon Douglas?

A. So I understood.

Q. He came there with Mr. Robinson?

A. I think Mr. Robinson was with him at that time.

Q. What was the conference about in Helena?

A. Largely how the loan stood, and whether Mr. Worthington wanted to continue with the loan, or otherwise.

Q. Was a decision reached in that conference?

[140]

A. Not at that time.

Mr. Van Cott: I believe Judge DeKalb it may be stipulated Defendant's Exhibit "4" is a copy of a telegram from the Regional Agricultural Credit Corporation to Mrs. Dorothy Worthington, dated January twenty-second, without any objection to competency?

Mr. DeKalb: Yes, you don't need to produce from the files of the Western Union the original.

(Testimony of H. H. Pigott.)

Q. Very well, I show you a telegram marked for identification Defendant's Exhibit "4", will you state whether such a telegram as that was dispatched by your office to Mrs. Dorothy Worthington?

A. Yes, I am quite sure that was.

Mr. Van Cott: We offer in evidence Defendant's Exhibit "4".

Mr. DeKalb: To which we object as immaterial, irrelevant, and illustrating no issue in the case.

The Court: It may be received.









(Testimony of H. H. Pigott.)

Q. I call your attention to a document marked for identification Defendant's Exhibit "5"?

A. That is a telegram we received from Max Worthington.

Mr. Van Cott: I agree to connect up the authority of Max Worthington to speak for Mrs. Worthington. We offer in evidence Defendant's Exhibit "5".

Mr. DeKalb: Same objection, and none other, on the promise of Counsel, if they don't connect it up.

The Court: Well, it may be received with that understanding.



THE COMPANY WILL APPRECIATE

SUGGESTIONS FROM ITS PATRONS CONCERNING

SERVICE

1201-S

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable sign above or preceding the address.

# WESTERN UNION

(32)...

R. B. WHITE  
PRESIDENT

NEWCOMB CARLTON  
CHAIRMAN OF THE BOARD

J. C. WILLEVER  
FIRST VICE-PRESIDENT

SIONS

DL = Day Letter

NM = Night Message

NL = Night Letter

LC = Deferred Cable

NLT = Cable Night Letter

Ship Radiogram

The filing time shown in the date line on telegrams and day letters is Standard Time at point of origin. Time of receipt is Standard Time at point of destination.

Received at 15 West Sixth Ave., Helena, Mont.

HAA147 17 XC=SHELBY MONT 23 125P

1935 JAN 23 PM 1 33

H H PIGGOTT=

REGIONAL AGRICULTURAL CREDIT CORPORATION HELENA MONT=

NOT INTERESTED IN HANDLING SIMON DOUGLAS PROPERTY IF NO

OTHER RECOURSE THAN TO TAKE OVER ALL OBLIGATIONS=

MAX WORTHINGTON.

Me #1237 - Depto Ex #5

Filed Feb 20-1940

*When permaradette obtain original mortgage file a cert of copy of same for reference. Then file for our inspection. Then we will send you a copy by photostatic copy.*

H. H. P. RECEIVED

JAN 28 1935

Ans'd Referred to

Mr. [Signature]

*Chapman, Regional Ag. of Credit Corp.*

*1/23*





(Testimony of H. H. Pigott.)

Cross Examination

By Mr. DeKalb:

Q. You had a conference with Max Worthington and W. E. [141] Robinson prior to or some days I take it or right close to the time when this telegram was sent, did you?

A. It was several days before, I think; I can't remember.

Q. You knew, of course, at that time, that Max Worthington, who had seen you, was not one of the heirs of the Douglas estate; his wife was one of the heirs, did you not? A. I so understood.

Q. Mrs. Worthington did not accompany him on this visit to the office of the Regional Corporation, did she? A. I think not.

Q. You have no recollection of it, at any rate?

A. I don't remember of her being there.

Q. The result of it was that something was said concerning the responsibility for this indebtedness, if they became interested in it?

A. I presume so, of course.

Q. The result of the telegram indicated a condition that Mr. Worthington considered confronted him, and he mentions it in the telegram, that condition being they were not going to assume the indebtedness of Simon Douglas in order to step into the breach?

A. That seems to be the tenor of that letter.

(Testimony of H. H. Pigott.)

Q. You knew as a matter of your general check up that Simon Douglas was heavily indebted to other people other than the Regional, didn't you?

A. I think his statement discloses other indebtedness.

Q. About fifteen or twenty thousand dollars?

A. I couldn't say.

Q. A large sum of money of indebtedness to other persons in addition, that is correct, is it not.

[142]

A. I don't remember the amount but he was indebted.

Q. You know there was an amount of indebtedness? A. Yes sir.

Mr. Van Cott: I have his financial statement here Judge DeKalb, if you would like to see it.

Mr. DeKalb: Oh, yes.

Q. This financial statement, I don't think I will introduce it in evidence, I will hand it to you to refresh your recollection. Is that the financial statement, copy of the financial statement furnished by Simon Douglas?

A. It seems to be the original. I have no doubt that is the original.

Q. According to your information there was a large amount of indebtedness to other persons, was there not?

A. Yes, this shows a very large amount.

Q. None of which, so far as you know, had been paid at that time? A. I presume not.

(Testimony of H. H. Pigott.)

Q. His source of payment was his income from the sheep and that income had been allocated to a reduction of the indebtedness to you, had it not?

A. It showed about \$13,300.00 in addition to the Regional.

Q. Did you take any steps to get in touch with the creditors or many creditors of Simon Douglas, other than yourself, of course, who were secured, with regard to moving in and protecting your security, as you thought?

A. I don't remember.

Q. What is your recollection? Do you have any recollection of having made any attempt to contact other creditors?

A. I have no recollection on the subject at all.

Q. Isn't it a fact, as you know, there was no step taken to [143] contact any of the other creditors?

A. I have no remembrance of what happened.

Mr. DeKalb: That is all.

#### Re-Direct Examination

By Mr. Van Cott:

Q. I should have asked this on direct examination. Isn't it a fact, after you received the telegram from Max Worthington you then directed the loan be allocated?

A. Yes, we received information to foreclose.

Witness Excused.

## MAX WORTHINGTON

being called as a witness for the defendant, and being duly sworn, testified as follows:

## Direct Examination

By Mr. Van Cott:

Q. What is your name?

A. Max Worthington.

Q. Where do you reside?

A. Helena, Montana.

Q. Your occupation?

A. I am a school teacher.

Q. You are the husband of Dorothy Worthington?  
A. Yes sir.

Q. She is the daughter of Simon Douglas, deceased?  
A. Yes sir.

Q. In January, 1935, at the time of the death of Simon Douglas, you resided in Shelby, Montana, did you not?  
A. Yes sir.

Q. I show you a document marked Exhibit "4". Do you remember when your wife received that telegram?

A. I remember we received a telegram and it was essentially this.

Q. Was that before or after you had been in Helena in [144] a conference with Mr. Pigott?

A. It was after.

Q. At that conference also was W. E. Robinson present, was he not?  
A. That is right.

Q. Will you tell the Court briefly what that conference in Helena consisted of?

(Testimony of Max Worthington.)

A. I came to find out just what the obligations were, or what would be necessary if I were to take over the obligations, and it was explained to me the amount of the indebtedness that the Regional claimed due. You might say that was all of the conference, to find out what he owed and what I would have to assume if I would take it over.

Q. Was any conclusion reached in that conference?  
A. No.

Q. Did you go to that conference with the knowledge and authority of your wife?

A. Yes sir.

Q. She didn't go with you?

A. No, she did not.

Q. When you returned home you received this telegram, or substantially similar to this one, marked Defendant's Exhibit "4"?  
A. Yes sir.

Q. And then you dispatched a telegram marked Defendant's Exhibit "5", did you not?

A. Yes, this looks like it.

Q. That was with the knowledge and authority of your wife?  
A. Yes sir.

### Cross Examination

By Mr. DeKalb:

Q. In the conference when Mr. Robinson was present the discussion ranged around the assumption of the obligations [145] of Simon Douglas, if you stepped into the breach at that time, is that it;



(Testimony of Max Worthington.)

in other words, you were to assume, that was the substance of the proposal?

A. There was no outright offer made to me. It was suggested, if it could be worked out in any way, I would have to assume the obligations.

Q. Was there any discussion at that time of the other obligations of Simon Douglas owing to other creditors? A. I don't—.

Q. Under this security?

A. I don't recall that we went into anything else, except I asked the question, if there were other debts I would have to assume them also.

Q. Yes. You knew at that time there were other obligations, did you?

A. We had heard by word of mouth there were.

Q. The Regional didn't confront you with any concrete figures on that?

A. As I recall, only the figures concerning his particular mortgage on the property.

Q. So, you obtained no other information than that between the time of your conference and the time you sent this telegram of January twenty-third in which you state, "Not interested in handling Simon Douglas property if no other recourse than to take over all obligations". That is correct, is it?

A. I received no other information, I should say specific or definite information, except what I could get by asking.

Q. You were not interested in stepping in and

(Testimony of Max Worthington.)

taking this personal liability? [146] A. No.

Q. For an obligation as Administrator or otherwise?

A. No, I was not interested because I was not qualified.

Q. Do you know anything about the sheep business yourself? A. No, I don't.

Q. Have you been fortunate or unfortunate enough to have had experience on a farm?

A. You say, had I?

Q. Yes?

A. No, only one or two weeks at a time was all.

Q. In this discussion at the Regional office, how were you going to acquire the title so you could step into this breach; was that discussed?

A. No, it was not.

Q. It was not?

A. I don't know how I was going to acquire title.

Q. Nothing was discussed about probate proceedings or anything of that kind? A. No sir.

Mr. DeKalb: That is all.

Witness Excused.

---

Mr. Van Cott: We have Mrs. Worthington but I believe you don't question the authority of Mr. Worthington to have acted for her, do you?

Mr. DeKalb: We don't question that. He said she knew about it.

Mr. Van Cott: Then I will forego calling Mrs. Worthington to the stand. Mr. and Mrs. Worthington are very anxious to leave for Helena. Do you have any [147] objections to them being released at this time?

Mr. DeKalb: I rather think not. No, I have no objection.

Mr. Van Cott: Mr. Pigott also wishes to be excused. May we have this witness excused?

The Court: Very well, they may be excused.

---

### VERNE MATHER

being called as a witness for the Defendant, and being duly sworn, testified as follows:

#### Direct Examination

By Mr. Van Cott:

Q. Will you state your name?

A. Verne Mather.

Q. Where do you reside?

A. Great Falls at the present time.

Q. In 1934 and 1935 what was your occupation?

A. I was one of the credit examiners for the Regional Agricultural Credit Corporation.

Q. As such did you have something to do with the proceedings for the sale of the sheep of Simon Douglas?

A. Yes sir.

Q. I show you a bundle of copies of letters, marked for identification Defendant's Exhibit "6",

(Testimony of Verne Mather.)

consisting of eight copies. Do you recognize these copies of letters?      A. Yes sir.

Q. Were the originals of those letters sent out by you?      A. Yes sir.

Mr. Van Cott: Now, if the Court please, I have Judge DeKalb's consent not to object to the competency of these copies, and I offer in evidence Defendant's Exhibit "6". These consist of copies of letters addressed to various prospective purchasers of the livestock? [148]

Mr. DeKalb: To which, of course, we make the objection that they are irrelevant to the issues in the case, and moreover there appears in these letters a self-serving declaration. We are not going to be bound by the self-serving declaration that appears in there. I will read that to the Court and the Court may see the point I make. The first sentence reads, "This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security." We don't want to be bound by that statement.

Mr. Van Cott: We don't claim anything by that.

The Court: Very well, with that understanding they will be received in evidence. The objection will be considered later on and the legal aspect of it.

## DEFENDANT'S EXHIBIT 6

Helena Branch  
Regional Agricultural Credit Corporation  
of Spokane, Washington  
Division of  
Farm Credit Administration

In Reply Refer to  
C12806—Simon Douglas, Deceased  
Armells, Montana

Helena, Montana  
January 29, 1935

Mr. A. C. Edwards  
c/o Farmers State Bank  
Denton, Montana

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

The sheep described more in detail are as follows:

200 ewes 1's  
150 ewes 2's  
50 ewes 3's  
50 ewes 4's  
700 ewes 5's  
1136 ewes 6's  
50 ewes, old  
1653 ewe lambs  
114 wether lambs  
60 mixed lambs  
88 bucks

Very truly yours,

V. T. MATHER

VTM:ZS

Credit Examiner

Helena Branch  
Regional Agricultural Credit Corporation  
of Spokane, Washington  
Division of  
Farm Credit Administration

In Reply Refer to  
C12806--Simon Douglas, Deceased  
Armells, Montana

Helena, Montana

Mr. Ned Latta  
Inspector, R. A. C. C.  
Columbus, Montana

January 29, 1935

Dear Mr. Latta:

We understand that you have some parties who are interested in purchasing sheep.



This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

The sheep described more in detail are as follows:

- 200 ewes 1's
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- 50 ewes 4's
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- 1136 ewes 6's
- 50 ewes, old
- 1653 ewe lambs
- 114 wether lambs
- 60 mixed lambs
- 88 bucks

Very truly yours,

V. T. MATHER

Credit Examiner

VTM:ZS

Helena Branch  
Regional Agricultural Credit Corporation  
of Spokane, Washington  
Division of  
Farm Credit Administration

In Reply Refer to  
C12806—Simon Douglas, Deceased  
Armells, Montana

Helena, Montana  
January 29, 1935

Mr. Wm. C. McHattie  
Plaza Apartments  
Helena, Montana

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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1653 ewe lambs  
114 wether lambs  
60 mixed lambs  
88 bucks

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V. T. MATHER

VTM:ZS

Credit Examiner

Helena Branch  
Regional Agricultural Credit Corporation  
of Spokane, Washington  
Division of  
Farm Credit Administration

In Reply Refer to  
C12806—Simon Douglas, Deceased  
Armells, Montana

Helena, Montana

Mr. Oliver Ebert  
Livingston, Montana

January 29, 1935

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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- 1653 ewe lambs
- 114 wether lambs
- 60 mixed lambs
- 88 bucks

Very truly yours,

V. T. MATHER

Credit Examiner

VTM:ZS

Helena Branch  
Regional Agricultural Credit Corporation  
of Spokane, Washington  
Division of  
Farm Credit Administration

In Reply Refer to  
C12806—Simon Douglas, Deceased  
Armells, Montana

Helena, Montana  
January 29, 1935

Mr. R. I. Balch  
Cascade, Montana

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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1653 ewe lambs  
114 wether lambs  
60 mixed lambs  
88 bucks

Very truly yours,

V. T. MATHER

VTM:ZS

Credit Examiner

Helena Branch  
Regional Agricultural Credit Corporation  
of Spokane, Washington  
Division of  
Farm Credit Administration

In Reply Refer to  
C12806—Simon Douglas, Deceased  
Armells, Montana

Helena, Montana

January 29, 1935

Mr. H. S. Stevenson  
310 Fifth Avenue,  
Helena, Montana

Dear Sir:

We understand that you are interested in purchasing sheep.



This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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- 1653 ewe lambs
- 114 wether lambs
- 60 mixed lambs
- 88 bucks

Very truly yours,

V. T. MATHER

Credit Examiner

VTM:ZS

Helena Branch  
Regional Agricultural Credit Corporation  
of Spokane, Washington  
Division of  
Farm Credit Administration

In Reply Refer to  
C12806—Simon Douglas, Deceased  
Armells, Montana

Helena, Montana  
January 29, 1935

Mr. Peder Hanson  
242 S. 4th St. W.  
Missoula, Montana

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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88 bucks

Very truly yours,

V. T. MATHER

VTM:ZS

Credit Examiner

Helena Branch  
Regional Agricultural Credit Corporation  
of Spokane, Washington  
Division of  
Farm Credit Administration

In Reply Refer to  
C12806—Simon Douglas, Deceased  
Armells, Montana

Helena, Montana

Mr. Sam Murphy  
Livingston, Montana

January 29, 1935

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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Very truly yours,

V. T. MATHER

Credit Examiner

VTM:ZS

Helena Branch  
Regional Agricultural Credit Corporation  
of Spokane, Washington  
Division of  
Farm Credit Administration

In Reply Refer to  
C12806—Simon Douglas, Deceased  
Armells, Montana

Helena, Montana  
January 29, 1935

Mr. V. R. Gallantine  
Martinsdale, Montana

Dear Sir:

We understand that you are interested in purchasing sheep.

This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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88 bucks

Very truly yours,

V. T. MATHER

VTM:ZS

Credit Examiner

Helena Branch  
Regional Agricultural Credit Corporation  
of Spokane, Washington  
Division of  
Farm Credit Administration

In Reply Refer to  
C12806—Simon Douglas, Deceased  
Armells, Montana

Helena, Montana

Mr. A. T. Hibbard  
Union Bank and Trust Company  
Helena, Montana

January 29, 1935

Dear Sir:

We understand that you are interested in purchasing sheep.



This is to advise you that one of our borrowers, Simon Douglas of Armells, Montana, recently passed away, and his heirs have requested the Regional to take over the security.

This security consists of 2414 sheep, 1837 lambs, 22 horses, ranch equipment, and 265 tons of hay, and will be sold at foreclosure sale at the Simon Douglas ranch, which is known as "The Horse Ranch", on February 5, 1935, at two P. M. This ranch is located about 40 miles northeast of Lewistown.

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- 114 wether lambs
- 60 mixed lambs
- 88 bucks

Very truly yours,

V. T. MATHER

Credit Examiner

VTM:ZS

Mr. DeKalb: Why not consider them read?

Mr. Van Cott: Very well.

The Court: Very well.

Mr. Van Cott: That is all.

Witness Excused

---

J. A. ROBINSON

being called as a witness for the Defendant, and  
being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. You may state your name?

A. J. A. Robinson.

Q. Where do you reside?

A. Helena, Montana.

Q. What is your occupation?

A. At the present time I am Inspector of the  
Regional Agricultural Credit Corporation at Salt  
Lake City. [149]

Q. What was it in 1934 and 1935?

A. Inspector and Credit Examiner of the  
Regional Agricultural Credit Corporation in  
Helena.

Q. When did you first have anything to do with  
the Simon Douglas outfit loan and mortgage?

A. I think it was the next date after the fore-  
closure notice had been posted for sale of his prop-  
erty.

(Testimony of J. A. Robinson.)

Q. What were you directed to do in that regard?

A. I was directed to go down and try to shape the property up as best we could to get the most out of it at the sale.

Q. What did you do pursuant to those instructions?

A. I went to Lewistown and took Ben Jefferson with me and picked up Mr. Cooper. We went out and got the sheep in to mouth them.

Q. Who is Ben Jefferson?

A. Another Inspector for the Regional Agricultural Credit Corporation.

Q. Residing where? A. Great Falls.

Q. Who was Mr. Cooper?

A. Mr. Cooper was an Inspector residing at Lewistown.

Q. E. C. Cooper? A. Yes sir.

Q. He was also connected with the Regional Agricultural Credit Corporation?

A. Yes sir.

Q. You say the three of you arranged to mouth the sheep? A. Yes sir.

Q. When did you do that with reference to the date of the sale?

A. I think it was about two days prior to the sale. I would not be sure.

Q. I show you a document consisting of four yellow sheets [150] which have been marked for identification Defendant's Exhibit "7". Will you state what that is?

(Testimony of J. A. Robinson.)

A. The first sheet is a tally of one band of the sheep, including some bucks. The second sheet is another tally of another band of sheep, showing the ewes and bucks separately. The next sheet is a summary of the previous two tally sheets, and the last one is a list of the property as it sold at the sale.

Q. The first sheet is in whose handwriting?

A. E. C. Cooper's.

Q. The second sheet is in whose handwriting?

A. E. C. Cooper's.

Q. The third sheet is in whose handwriting?

A. Mine.

Q. And the fourth sheet is in whose handwriting?  
A. In my handwriting too.

Q. This is the original record made by you people who mouthed and counted the sheep?

A. In preparation for the sale, yes sir.

Q. How did you conduct this mouthing?

A. Well, Mr. Cooper tallied; Mr. Jefferson mouthed, and I was kind of assisting around there, helping crowding them up the chute and we had the assistance of a herder.

Q. You handled the gate?      A. Yes sir.

Q. You handled the gate and let a sheep out?

A. I let the sheep out.

Q. Out to Jefferson and Jefferson examined its mouth and reported the result?

A. Yes sir.

Q. And then Cooper tallied the result?

(Testimony of J. A. Robinson.)

A. Yes sir. [151]

Q. Did you mouth all the sheep in those bands?

A. Yes sir.

Q. Did you make any effort in regard to securing bidders at that sale?

A. I think I was the one, I requested these letters be written that were just received in evidence so I would feel more sure we would have bidders who could take the sheep.

Mr. Van Cott: Now, Judge DeKalb, I will connect this up with other witnesses but I can't do it all at once.

Q. Will you tell the Court what the result of your mouthing and count was in numbers?

A. I will have to have that sheet to refer to because I can't remember.

Q. What I want you to do is to state the number of ones, twos, threes, and so on in each of those two bands?

A. The first band contained 4 yearlings; 22 two-year olds; 68 three year olds; 185 four year olds; 347 five year olds; 422 aged sheep, 2 lambs; also 19 bucks four years old; 12 bucks five year olds; 5 bucks, aged, making a total of 1086 sheep in this band.

Q. That band was the smaller of the two bands, was it not?

A. Yes sir. The other band contained 20 yearlings; 203 two year olds; 423 three year olds; 240

(Testimony of J. A. Robinson.)

four year olds; 205 five year olds, and 122 aged ewes. In fact, these are all ewes. 17 four year old bucks.

Q. Before you go on, you stated 122 aged. Did you add to that later on 33?

A. I will get to that.

Q. Very well?

A. Yes, we did. That was added over here; 33 aged sheep. [152] There are 17 four year old bucks in the last band and 18 five year olds and 3 aged, making 1251 in this band.

Q. I believe you testified in that smaller band you had 4 yearlings and in the other band 20 yearlings?

A. Yes sir.

Q. Should that not be the other way around?

A. No.

Q. No?           A. No.

Q. There were 4 in the smaller band and 20 in the larger band, is that correct?           A. Yes sir.

Q. What was the condition of these two bands of sheep?

A. They were in fair condition. The larger band was in slightly better condition than the smaller band.

Q. Do you know how many lambs there were?

A. 1400 and some; to be exact, 1453 ewe lambs.

Q. Were there a few wethers in with those ewe lambs?

A. There might have been a small sprinkling of lambs.



(Testimony of J. A. Robinson.)

Q. What was the condition of those lambs?

A. They would weigh, in my opinion, in the neighborhood of fifty-five pounds.

Q. Is that good condition, or otherwise?

A. For a lamb of that age it is in good condition.

Q. What would it indicate in regard to feed conditions?

A. Feed conditions—they had been through a pretty serious year, the previous year, in 1934, and they were bound to be short of feed.

Q. Were you present at the sale?

A. Yes sir.

Q. What time of the day did it commence?

A. Two o'clock, I believe.

Q. How long did it last? A. Until dark.

Q. Until dark? A. Yes sir. [153]

Q. What attendance was there at the sale?

A. As near as I can recollect, I think there were around seventy-five people there.

Q. Were *there* some substantial bidders present?

A. Yes sir.

Q. Will you name them to the Court?

A. There was Henry Lingshire, Bill Ragen, Daily Johnson, Mr. Balch, Mr. Wildschults. There were others there but I don't recall them.

Q. Was Mr. Balch there?

A. I got that in.

Q. Do you recall a banker by the name of A. C. Edwards being there?

(Testimony of J. A. Robinson.)

A. I understood he was there. I didn't see him myself.

Q. Do you recall a man by the name of Fush?

A. Yes sir.

Q. Was he present?           A. Yes sir.

Q. Describe to the Court the way the sale was conducted?

A. Mr. Cooper was the auctioneer, and we had the two bands in separate corrals so we could handle them, and he dwelt on these sheep really too long I thought to get the best he could for them, to give everybody an opportunity. Everybody had an opportunity to go in among the sheep and mouth them and judge for themselves the age of them.

Q. Did they go in and examine them?

A. Yes, previous to the sale they were in and out among them for an hour or more.

Q. Did Mr. Cooper give these respective bidders an opportunity to make their calculations also?

A. Yes sir.

Q. What was the first lot sold? [154]

A. The first lot sold was the 1080 bunch. 1086 here but when they were delivered there was only 1080.

Q. In that bunch there were 4 yearlings, 22 two year olds, 68 three year olds, 185 four year olds, 347 five year olds and 422 aged, is that right?

A. And 2 lambs and 36 bucks.

Q. What was the successful bid on those?

A. \$2.25 per head.

(Testimony of J. A. Robinson.)

Q. How long have you been in the sheep business or connected with the sheep business?

A. I have been connected with loans and investigations on livestock, oh—twenty years, or more.

Q. During that time have you been familiar with the market prices and values of sheep in this territory?

A. To some extent. To the extent I have sold considerable sheep.

Q. Have you an opinion as to whether or not the price paid for that lot was a fair value of them?

Mr. DeKalb: To which we object. He has not been shown to be qualified.

The Court: I doubt if you have gone far enough in qualifying him, have you?

Q. Were you familiar with the market value of sheep of this quality on the fifth day of February, 1935 in Fergus County, Montana?

A. I rather think so.

Q. Have you an opinion as to whether the price received for this lot was a fair market value of it?

Mr. DeKalb: I object to that. That is brought about in an indirect way in establishing values.

Let's [155] find out what this man was willing to say was the value of sheep of that character in that vicinity at that time.

Q. Very well. Have you an opinion as to the market value of sheep of this quality and kind in Fergus County, Montana on February fifth, 1935?

A. Yes sir.

(Testimony of J. A. Robinson.)

Q. What is your opinion was the fair market value of those sheep?

A. The price that was obtained for them.

Q. What was the next lot sold?

A. The next lot was the larger band.

Q. Consisting of 20 yearlings, 203 two year olds, 423 three year olds, 240 four year olds, 205 five year olds and 155 aged?

A. 122 aged. There were 38 bucks there too.

Q. Who was the successful bidder of that lot?

A. Mr. Ragan.

Q. Was it Ragan or Lingshire?

A. That is the way I have the name on my list here; they were working together.

Q. What was the price paid for them?

A. \$3.40 a head.

Q. Would you say in your opinion that was a fair value of those ewes in Fergus County, Montana on February fifth, 1935?

A. \$3.40, yes sir.

Q. What was the next lot sold?

A. The next lot sold was 21 horses.

Q. 21 horses? A. Yes sir.

Q. Who was the successful bidder?

A. Matt Wildschults.

Q. What did he pay? [156]

A. He paid \$860.00 for the 21 horses.

Q. What was the next lot sold?

A. Molasses cake.

(Testimony of J. A. Robinson.)

Q. What did that consist of?

A. It consisted of 308 one hundred pound sacks of cake.

Q. What did it sell for?

A. \$1.30 per sack.

Q. To the Fergus Ranch Company?

A. Yes sir.

Q. Do you know anything about the value of molasses cake in Fergus County, Montana on February fifth, 1935?

A. Well, my recollection is it was in the neighborhood of \$40.00 a ton. That would make it about two dollars a sack.

Q. What about the demand for molasses cake at that time of the year?

A. The demand had slacked off. People were pretty well filled up with their feed for the winter, and the demand would not be very great at that time, unless you caught somebody without feed.

Q. What was the next lot sold?

A. 236 small cut back lambs and some bucks with a sprinkling of old ewes in them; a hospital bunch.

Q. Please explain?

A. The cut back lambs are small lambs that have not done well and need extra care and they place them in what is called a hospital.

Q. By hospital, you mean they have to be fed certain special things?



(Testimony of J. A. Robinson.)

A. Yes, they have to be fed better than the others.

Q. What did they sell for, the 236?

A. \$110.00 for the 236. [157]

Q. What efforts did the auctioneer make to make that sale?

A. That was the hardest sale of all. The auctioneer had to plead with Wight for a long while to get him to take them.

Q. Tom Wight was on the ground in charge for Simon Douglas?                      A. Yes sir.

Q. What was the next lot sold?

A. The machinery equipment.

Q. Of what did that consist—describe to the Court?

A. It consisted of hay machinery and tractor, an old tractor, an old car, some wagons and sheep camp.

Q. What was its condition?

A. Badly run down.

Q. What did it sell for?                      A. \$435.00.

Q. What was the next lot you sold?

A. The hay. 46 tons of hay to H. R. Cameron.

Q. What was it sold for?

A. \$2.10 per ton.

Q. Will you describe it, please?

A. It was some two year old hay or three possibly some of it. For the greater part it was almost entirely cheap grass.



(Testimony of J. A. Robinson.)

Q. Is cheap grass good to feed or otherwise?

A. Cheap grass is the poorest kind of feed.

Q. What effect does the age of the hay have on its quality and value?

A. Well, there is the possibility or probability having it in previous years filled with moisture, and getting it soaked down pretty well and it will spoil in the stack.

Q. What was the next lot you sold?

A. 90 tons of oat hay and blue joint hay.

Q. You say 90 tons? A. Yes sir.

Q. What did that sell for? A. \$4.25.

Q. Who bid that in? [158]

A. I bid it in as Trustee. I couldn't find any one to bid on it.

Q. You couldn't find a buyer and you bid it in?

A. Yes sir.

Q. Later on did you sell it? A. Yes sir.

Q. To whom did you sell it?

A. I think to Mr. Disbrough.

Q. Do you recall what you received for it?

A. I received more than what I paid for it.

Q. \$5.50? A. I might have, I don't know.

Q. Did you credit Simon Douglas with the full amount you received? A. Yes sir.

Q. Describe the 90 tons of oat hay and blue joint?

A. Well, blue joint is rather a good feed and oat hay is good feed up until perhaps after the first of

(Testimony of J. A. Robinson.)

the year. The mice get to working on it so hard there is a lot of waste.

Q. What was the next lot you sold?

A. 800 pounds of oats.

Mr. Van Cott: The return in the pleadings show that as bushels and it should be pounds.

Mr. DeKalb: I imagine so.

Q. What did you receive for this 800 pounds of oats?      A. \$1.50. Twelve Dollars.

Q. What was the next lot you sold?

A. That was all.

Q. What was the next lot you sold?

A. That was all of it.

Q. You haven't mentioned the lambs yet?

A. The lambs?

Q. Yes? [159]

A. Oh, you didn't inquire about them, did you. I think the lambs were sold there before or after the ewes.

Q. Who was the successful bidder for the lambs?

A. Daley Johnson.

Q. What did he pay?      A. \$4.10.

Q. What in your opinion was a fair value of this bunch of 1453 ewe lambs in Fergus County on February fifth, 1935 per head?

A. Oh, from \$3.00 to \$3.25 a head.

Q. The bid you say was \$4.10?

A. Yes sir.

Q. Was there anything unusual that occurred during the progress of that sale?      A. Yes sir.

(Testimony of J. A. Robinson.)

Q What was it?

A. Mr. Johnson served notice of protesting the sale on Mr. Cooper.

Q. Mr. Johnson, who is he?

A. Of the National Bank of Fergus County. I think that is the name of the bank.

Q. Did he say anything or just serve the notice?

A. No, he didn't. He served the notice before the sale.

Q. What was done with the notice?

A. I think it is in the file.

Q. It was not read or announced?

A. No sir.

Q. Did anything else unusual occur?

A. Yes, Mr. Vralstad from Stanford came in to protest the sale to Mr. Cooper.

Q. Tell what he said?

A. Well, he was talking with Mr. Cooper and Mr. Cooper told him to come and see me, and I took him off and he said we couldn't handle the sale without an Administrator, I [160] believe it was; I couldn't say the exact words he used.

Q. In what tone of voice did he say that?

A. He talked very reasonable and fair to me.

Q. Was it said in a tone of voice so it could be heard there generally? A. I don't think so.

Q. What did you do with this gentleman after he made that statement to Mr. Cooper?

A. He went with me over to the side of the shed and we talked there and the sale continued.

(Testimony of J. A. Robinson.)

Q. Was that the end of that episode?

A. Yes sir.

Q. So far as you are aware did either of those events influence the bidding?

A. I don't think so.

Q. Was the property offered as a whole in addition to being offered in part?

A. I can't recollect that.

Cross Examination

By Mr. DeKalb:

Q. Mr. Vralstad specifically drew or directed your attention to the fact that he claimed the sale was an illegal sale, resulting from a violation of the statute of Montana, prohibiting a sale being made in the interim between the death of the party and the appointment of an administrator, did he?

A. It is possible. I would not say he did or that he did not.

Q. You saw Mr. Vralstad discussing some matter with persons who came up there as bidders, did you not?

A. No sir.

Q. You did not? A. No sir.

Q. You would say that he did not? [161]

A. No, I would not say that he did not.

Q. He didn't discuss these matters with persons who were bidders. Now, when you base your statement or when you make your statement of values here, you are influenced, are you not, by the fact that here was a public sale and these prices were

(Testimony of J. A. Robinson.)

obtained at a public sale, you are influenced by that, are you not, in stating that——?

A. Not necessarily.

Q. You knew of sales of sheep, lambs, ewes of different ages, some of the same age as these, occurring in the county or in the same period, influenced by the same price conditions, for more money than that, didn't you, at that time?

A. No sir, I did not.

Q. Were there any other sales that you were cognizant of that occurred in the area that would be controlled by the same conditions during or around that time?      A. No sir.

Q. What then was it that gave you an index as to these values, what did you base it on?

A. I based it on the fact that the Government bought those for about a dollar in the previous fall.

Q. You knew the conditions under which that was done?      A. Yes sir.

Q. That was done with the idea of getting rid of a bad market condition later on. It was done with the design of improving the condition of the sheep business?      A. No sir.

Q. What was it done for?

A. To avoid a death loss from drought.

Q. You know the Government purchases were slaughtered, were they not? [162]

A. Yes sir.

Q. The avowed purpose and design of the Department in getting rid of them, and buying them



(Testimony of J. A. Robinson.)

up and getting rid of them was to improve the condition of the sheep business, was that not its object?

A. No, it was done to stop the stock grower from taking the loss.

Q. To improve the condition of the sheep industry, was it not?

A. Well, the way I looked at it, and I went through a lot of it in eastern Montana, it was done in this way. The sheep were worth a dollar and they made it two dollars so the owner could pay one dollar to the mortgagee and one dollar to himself.

Q. You don't maintain the Government was influenced to any great extent by market conditions, do you, in the price offered?

A. If they were, they would not have paid two dollars.

Q. They were not influenced at all in doing that. The apparent object was to improve the sheep industry, was it not?

A. No, I think it was to improve the financial condition of the sheep man.

The Court: Let's let it stand at that. That is close enough.

Q. Yes. Now, was there any effort made here to take out of these different bands and throw together the sheep of a certain class. For instance, the lambs, the year old lambs or anything of that kind, what you might consider a prime pick of the flocks? [163]



(Testimony of J. A. Robinson.)

A. The lambs were sold together, and the other were mouthed as listed and represented that way to the buyer.

Q. They were sold in bands? A. Yes sir.

Q. As defined from an attempt to segregate out the choicer animals of those bands and sell them that way. In other words, any purchaser under the system that was put in practice that day was obliged to take some of the unwanted band, some broken mouthed ewes, and some of what have you, whether he wanted them, or not? A. Yes sir.

Q. I say, was any attempt made here to make a real attractive looking bunch of sheep out of these several bands?

A. Well, the best we could do under the circumstances was to mouth them out and given them an idea of the ages in each band, and that is what we did.

Q. Was that the first chattel mortgage auction sale you ever attended? A. No sir.

Q. You have attended others, have you?

A. Yes sir.

Q. Any during that particular winter?

A. No sir.

Q. That was the only sale that you attended—?

A. Well, I said—no. It is possible that I did attend some sale but I don't recollect.

Q. Let's take the period from December until, let's see, May first, December to May first, were

(Testimony of J. A. Robinson.)

you in attendance upon any sales during that period?      A. I couldn't definitely say, no.

Q. Were there any purchases or sales of sheep in that period taking place, under your knowledge?

A. I don't think so because most of our people were checked [164] up before the first of the year so I didn't have anything to do about it.

Q. About the only thing you had to go on then was the general mutton market, if we may call it that?      A. Yes sir.

Q. And that had largely to do with lambs and younger stuff, didn't it?

A. Well, in the fall, no. About the time of this sale I don't know that that had anything to do with what the markets were based upon.

Q. At this particular moment the normal expectation would be within about seventy days, or something like that, lambing would occur?

A. Yes sir.

Q. You say the bucks were still in the bands?

A. Yes sir.

Q. As indicating the ewes were in process of being bred for the lamb crop in the spring?

A. They should have been bred before that.

Q. You don't know how long the bucks were in there?      A. No sir.

Q. December would be the month, would it not?

A. I think for that locality over there.

Q. That would bring the lambs in what month?

A. The first of May.

(Testimony of J. A. Robinson.)

Q. There was a wool crop in expectation coming along about the month of June. Do you recall what the prospective price of wool was at that time or whether any was being consigned at that time?

A. No sir, I don't.

Q. Do you know anything about the band Lingshire purchased?

Mr. Van Cott: I will say we will produce a [165] witness who purchased these sheep and who will testify as to what was done.

Mr. DeKalb: Well, I will ask him.

Q. Do you know anything about the Lingshire sheep which were purchased at this sale. Were they re-sold a few days later?

A. I understood they were sold the next day.

Q. At a handsome profit, almost double what was paid for them?

A. I wouldn't say as to that, I don't know.

### Redirect Examination

By Mr. Van Cott:

Q. Counsel asked you whether you made any effort to separate this bunch or these sheep so as to make a separate band. Will you state whether there was anything more that could have been done to improve the bands more profitably?

A. I don't think so at the time or we would have done it.

Q. Calling your attention to the fact that according to your count in that smaller band there

(Testimony of J. A. Robinson.)

were only 110 sheep ones, twos or threes, and that balance of that band were over three?

A. Yes.

Q. What would have been the effect upon the band if you had taken out all the young sheep?

A. It might have caused a lower price.

Q. Calling your attention to the fact, according to your count, the larger band consisted of 1230, there were only 630 ones, twos or threes, what would have been the effect on the aged sheep if you had taken out of that band the ones, two and threes?

A. We would have lost considerably on the price bid for them.

Witness Excused. [166]

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## BEN JEFFERSON

being called as a witness for the Defendant, and being duly sworn, testified as follows:

### Direct Examination

By Mr. Van Cott:

Q. What is your name?

A. Ben Jefferson.

Q. Where do you live?                   A. Great Falls.

Q. What is your business?

A. Brand inspector part time, and part time trading in livestock and cattle.

Q. What was your occupation in 1934 and 1935?

(Testimony of Ben Jefferson.)

A. Inspector for the R. A. C. C. in Helena.

Q. That is the Regional Agricultural Credit Corporation?      A. Yes sir.

Q. How long have you been engaged in the livestock business in one way or the other?

A. Well, I was raised on a ranch, and actively have been engaged in the livestock industry either stock or cattle or sheep for the past twenty-five years.

Q. You heard J. A. Robinson testify to mouth-  
ing the sheep. You are the Ben Jefferson he re-  
ferred to as having assisted in that operation?

A. Yes sir.

Q. You are the one that actually looked into  
the mouths of the ewes, are you?      A. Yes sir.

Q. Do you recall having done that on that occa-  
sion?      A. Yes sir.

Q. Did you use your best judgment in reaching  
a conclusion as to the age of those sheep?

A. I did.

Q. What experience had you had before that  
time in mouthing sheep?

A. As I say, I had been engaged in the sheep  
business. I put in a good many years with one of  
the largest sheep [167] concerns in Montana.

Q. Which was that?

A. J. B. Long and Company.

Q. Did you do mouthing in that connection?

A. Yes sir.

Q. How frequently?



(Testimony of Ben Jefferson.)

A. Well, at least, once a year.

Q. Did you state your best judgment with respect to each sheep you mouthed on that day?

A. Yes sir.

Q. And you expressed it to Mr. Cooper and Mr. Robinson?      A. Yes sir.

Q. What was the condition of the ranch out there?

A. Well, it showed the effects of the drouth the summer previous.

Q. What was the condition of the sheep that were sold?

A. They also showed the effects of the drouth.

Q. Which of the two bands of ewes showed the effect of the drouth most?

A. I don't remember whether it was the smaller band or the larger band.

Q. There was a difference, was there?

A. There was a difference.

Q. What about the lambs, what was their condition?

A. They would be classed as poor lambs, light.  
Mr. Van Cott: You may take the witness.

### Cross Examination

By Mr. DeKalb:

Q. Now, you noticed the spread there, did you not, hay and oats and oil cake, etc. were on hand?

A. Yes sir. [168]



(Testimony of Ben Jefferson.)

Q. Do you know about how much hay it takes to carry a sheep through?

A. Well, it depends on your range conditions and the condition of the sheep.

Q. There has been some testimony here with regard to the range conditions? A. Yes.

Q. What observation did you make there at that time as to the condition of the range?

A. It was not such that it would carry these sheep through the winter.

Q. That would be up to lambing time or when the grass would come?

A. If these sheep were bred to lamb in May, which I understood they were, it looked like a picture of buying quite a lot more feed I would say. That is the picture as presented.

Q. If there was on hand 136 tons of hay and several tons of oil cake, what in your opinion,—how far would that go in helping out the range conditions of some 4200 sheep of every description?

A. The quality of the feed was not right to carry these sheep on through during lambing. It was not the right kind of feed.

Q. Do you have any particular objection to oil cake,—I think it is called molasses cake, is that not good? A. It is considered good, yes.

Q. It sells at quite a high price per ton, if a sheep man comes to buy it, does it not?

A. Yes, sir.

(Testimony of Ben Jefferson.)

Q. Do you know anything about its condition, whether it had been well kept and protected from the weather? [169]      A. No.

Q. Did you see it at all that day?

A. It was stored in the shed there.

Q. You didn't make any particular examination of it, did you?

A. No, other than to note the quantity that was there, the amount.

Q. So far as you know, it was well stored and well cared for and in good condition?

A. Yes sir.

Q. You think that you can distinguish a five year old sheep by mouthing, do you?

A. No, it is not possible to tell the exact age of a sheep after it attains its fourth year, but the appearance of the teeth, the amount of wear and cleanliness, you can guess pretty close.

Q. It is not necessarily a broken mouth; there is a distinction between a good mouth, is there not?

A. That is what they call a spreader.

### Redirect Examination

By Mr. Van Cott:

Q. What do you mean by a spreader?

A. A broken mouth shows loss of teeth,—some of the teeth have fallen out; they spread before they fall; they show gaps between the teeth.

Q. When their mouth becomes broken or spread they have difficulty in feeding, do they not?

(Testimony of Ben Jefferson.)

A. They can eat but they don't get the right,— they don't eat properly; they don't get the amount of grass they should.

Witness Excused. [170]

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### ED. C. COOPER

being called as a witness for the Defendant, and being duly sworn, testified as follows:

#### Direct Examination

By Mr. Van Cott:

Q. State your name? A. Ed. C. Cooper.

Q. Where do you reside? A. Lewistown.

Q. What is your occupation?

A. Ranching.

Q. Are you now connected with the Regional Agricultural Credit Corporation? A. I was.

Q. You are not now? A. No.

Q. You were in 1934 and 1935?

A. Yes sir.

Q. In what capacity? A. Inspector.

Q. Inspector? A. Yes sir.

Q. Were you familiar with the Simon Douglas outfit loan and mortgages? A. Yes sir.

Q. What had you had to do with it?

A. I went out and inspected the hay and range and feeding conditions, and inspected the sheep for the loan.

(Testimony of Ed. C. Cooper.)

Q. When are you referring to, what time?

A. Right after they made the application in November.

Q. Of what year?

A. That would be 1933.

Q. Were you familiar with it from that time on until it was sold?

A. Yes sir.

Q. Referring to the early part of 1935, will you state what the conditions were with respect to feed?

A. Well, the feed was not very good that winter. This feed they had on the west range was very poor sheep feed. It would be all right for cattle feed.

Q. You mean the hay they have described and also the molasses cake?

A. Molasses cake is good for sheep in case of storm; that is [171] what molasses cake is for.

Q. That is what you call emergency feed?

A. That is what you call emergency feed.

Q. Can a sheep man afford to feed that regularly to his sheep?

A. Yes, when he is short of feed.

Q. What was the condition of the sheep at that same time?

A. The sheep showed drouth. They had gone through a couple of years of dry seasons.

Q. What effect does that have upon sheep to go through successive dry seasons?

A. They are not in condition.

(Testimony of Ed. C. Cooper.)

Q. You have heard Mr. Jefferson and Mr. Robinson describe the mouthing of the sheep. You are the Mr. Cooper that participated in that same operation, are you not?      A. Yes sir.

Q. I call your attention to Defendant's Exhibit "7", on the first two pages of which there are tallies; were those made by you?      A. Yes sir.

Q. Did you correctly tally here the instant that Mr. Cooper called out as he was mouthing the sheep, I mean Mr. Jefferson?      A. Yes sir.

Mr. Van Cott: We offer in evidence Defendant's Exhibit "7".

Mr. DeKalb: I think there is no objection to it, if the Court please.

The Court: Let it be received.



1237

Ex # 7

Feb 20 1940

CR. Bureau

Clm.

EB Chapman

Regional Agricultural  
Credit Corporation

15-20-4 = 24

25-22-203 = 226

35-68-4x3 = 491

45-115-240 = 475

55-347-205 = 552

agrd. 422-22-32577

7994

9936

UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

OCT 23 1941

PAUL P. O'BRIEN

CLERK





[illegible]



26	108 1/2
<u>181</u>	<u>2172</u>
288	543
<u>26</u>	<u>2715</u>
463	

1934 Jan. Lumber, fine wood ✓  
 Paid 1453 5957<sup>30</sup>

O. O. Mfg. Co. @ 25 1080  
 Paid 2715 ✓  
 Paid 1237 Pd. 4205.80

North Atlantic 21 lb. Pd. 13383.10 ✓

Finger Paint Co.  
 Paid 130 per sack 308 400<sup>40</sup> ✓

Tom Wright 25 lb. Pd. (111.7) ✓  
 14061.10

4  
 Paid 435 11096.00 ✓

Black  
 H. K. Co. 210 Pd. 96<sup>60</sup> ✓

Get in the Sun  
 Paid 495 ✓

Cats. 800 lbs.  
 Tom Wright Pd. (12<sup>00</sup>) ✓



Old Band ..... Feb. 2, 1935

41 - yearlings	135 - 4 yr olds
22 - 2 yr olds	347 - 5 yr olds
68 - 3 yr olds	432 - ages
<u>94</u>	<u>2. Lamb</u>
	956

Bucks 19-4s.

" 12-5s

" 5. ages x  
36

94  
956  
36  
1086

Young Band Months Feb. 2, 1935

20 yearlings	240 - 4 yr olds
203 - 2 yr olds	205 - 5 yr olds
423 - 3 yr olds	122 - ages
<u>646</u>	<u>567</u>

17 - 4 yr olds

18 - 5 yr olds

3 - ages

38

646  
567  
38

1251





(Testimony of Ed. C. Cooper.)

Q. Were you the auctioneer? A. Yes sir.

Q. What preparations, if any, did you make for the conducting of this sale? [172]

A. Well, I spoke to everybody that was inquiring about the sale, and told them what it consisted of.

Q. That is, you told people that the sale was going to occur? A. Yes sir.

Q. Whereabouts did you do that, in what vicinity? A. In Lewistown.

Q. Did you see some of the persons you told about the sale at the sale?

A. I don't remember now.

Q. Now, as auctioner, did you first offer the property for sale as a unit? A. Yes sir.

Q. Did you have any bidders for it as a unit?

A. No sir.

Q. Then did you offer the property in parcels as described by J. A. Robinson? A. Yes sir.

Q. As you proceeded with the sale what efforts did you make as auctioner to secure bids?

A. Well, I tried—any bids I had I would ask for a larger bid.

Q. You made efforts did you to secure better bids? A. Yes sir.

Q. What did you do respecting the length of sufficient time of bidders to make calculations?

A. I think I took all the time required, and some of the bidders thought I took too much.

(Testimony of Ed. C. Cooper.)

Q. Now, Mr. Robinson has testified that a County Attorney, Mr. Vralstad, came to you and made some comment about the sale. Will you tell the Court just what he said?

A. I was in the shed with one band of ewes and Mr. Vralstad came over and said he wanted to protest the sale. I said, "all right, you talk to that gentleman standing over [173] there against the side of the shed".

Q. Who was that?           A. Jack Robinson.

Q. Was that all that was said?

A. As near as I can remember, that was all that was said.

Q. Let me refresh your recollection. Did you say to him, "You give me a check for the amount owing and you can"?

A. I believe I said, "You give me a check for the amount of the sale that the Regional Agricultural Credit Corporation has coming for the assignment and you can most likely have the whole thing".

Q. Had you known him before?

A. No sir.

Q. Was he in any way connected with the Regional?           A. Not that I know of.

Q. Or in any way connected with any of the bidders?           A. No sir.

Q. In what tone of voice did he make that comment?           A. It was not unpleasant.

Q. Was it a loud voice?           A. No sir.

(Testimony of Ed. C. Cooper.)

Q. So far as you know did it affect the bids in any way?      A. No sir.

Cross Examination

By Mr. DeKalb:

Q. What was the condition of the weather there on that day?      A. It was a raw day.

Q. What was the condition of the weather on the day preceding it?

A. Well, that was just a raw spell in there. I wouldn't say whether it was objectionable.

Q. Was it squally cast-over weather?

A. Yes sir.

Mr. DeKalb: That is all.

Witness Excused [174]

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W. E. ROBINSON

being called as a witness for the Defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. Please state your name?

A. W. E. Robinson.

Q. Where do you live?

A. Lewistown, Montana.

Q. What is your occupation?

A. I am a wool and livestock buyer.

(Testimony of W. E. Robinson.)

Q. How long have you followed that occupation in that vicinity?      A. Since about 1925.

Q. Were you acquainted with Simon Douglas in his life time?      A. I was.

Q. Describe to the Court the extent and nature of that relationship?

A. I have known Mr. Douglas from approximately 1925 until his death, and I was, more or less, familiar with his affairs, and while he was banking at home he didn't have many difficulties but when he transferred his loan to Helena it was necessary for him to do it through correspondence, and he used to use my office somewhat in order to carry on this correspondence through my stenographer.

Q. During the time the loan of Simon Douglas was with the Regional, from 1933 to 1934, to what extent were you familiar with the condition of that loan?

A. I helped him make up his budgets, and would write to them once in a while asking them for advances, his expenses. I assisted him in making up his renewal application in the fall of 1934. I didn't have anything to do with the application in 1933.

Q. Calling your attention to a document marked for identifica- [175] tion, Defendant's Exhibit "9", is that the renewal application to which you just referred?

A. It is the original of the renewal.

(Testimony of W. E. Robinson.)

Q. Will you look at the reverse of it and see the signature?

A. One of the signatures of the witnesses is mine.

Q. Did you see Simon Douglas sign that application?      A. I did.

Q. Then you signed as a witness?

A. That is right.

Q. When he signed it was it made out in the form it now appears in?      A. Yes sir.

Q. You stated that you had filled out the information in this application for him?

A. Well, he worked out the information with me regarding the statement.

Q. Then you did the mechanical work of writing it out?

A. I started to write it out and my stenographer finished it.

Q. These figures here that appear were the figures that Simon Douglas, himself, stated?

A. Yes sir.

Q. Calling your attention to the fact it is dated November twenty-seventh, 1934, that is some two months and a half prior to his death, do you recall?

A. That must be the date.

Q. Calling your attention to the fact that Simon Douglas in his application states that he had 200 yearling ewes in his herd, is that what he told you?

A. I can't remember the conversation but I presume that statement is correct.



(Testimony of W. E. Robinson.)

Q. You see it there, don't you?

A. Yes sir.

Q. Then also 200 breeding ewes, twos and threes, that appears there? [176]

A. Yes sir.

Q. 750 breeding ewes, fours and fives, that appears there?

A. Yes sir.

Q. 1186 aged sheep?

A. Yes sir.

Mr. Van Cott: We offer in evidence Defendant's Exhibit "9". There is no objection, Judge DeKalb told me.

APPROVED BY  
FARM CREDIT ADMINISTRATION  
HELENA BRANCH  
Regional Agricultural Credit Corporation  
of Spokane, Washington  
HELENA, MONTANA

APP. NO. 16317  
LOAN NO. 13776  
12506

## APPLICATION FOR RENEWAL OF CHATTEL MORTGAGE LOANS

For the purpose of obtaining a renewal of my loan in amount of \$2600.00, I furnish you with the following statement and information, which is a true and correct statement of my financial condition.

Dated at Lewistown, Montana this 27th day of November, 1934  
NAME Simon Douglas Age 65 Wife's Name Deceased  
Children (number) 1 Ages 25 How many boys over 12 years old at home? None  
Firm Name (if Partnership) \_\_\_\_\_  
Names of Partners \_\_\_\_\_ Wife's Name \_\_\_\_\_  
Wife's Name \_\_\_\_\_

Farm Located 10 miles N. E. from Armells, Montana  
(Direction) (Shipping Point)  
(P.O.) Armells COUNTY Fergus STATE Montana  
(1) Is it possible for you to obtain this loan through a Production Credit Association, a local Bank or some other loaning agency? No. How will you repay this loan? Sale sheep and wool  
(2) Has anyone having an interest in this property died since the loan was first made? No If so, give particulars \_\_\_\_\_

(3) Besides amount necessary to renew my loan, I will need \$ 1550.00 additional for the following purposes:  
Personal taxes, \$300.00; Cotton seed cake, \$1250.00

(4) Last year I received from sale of: I estimate it will cost me for operation for the next 12 months:

Cattle	\$	<u>8500.00</u>	Meat	\$	<u>1100.00</u>
Wool (estimated value)	\$	<u>8500.00</u>	Feed	\$	<u>1515.00</u>
Sheep (Wool not sold)	\$	<u>4400.00</u>	Family Expenses	\$	<u>550.00</u>
Crops	\$	<u>2840.00</u>	Labor	\$	<u>4275.00</u>
Milk and Cream	\$		Gas, Oil and Repairs	\$	<u>520.00</u>
Poultry and Miscellaneous	\$		Interest, Tax, Leases	\$	<u>4360.00</u>
Total	\$	<u>17560.00</u>	Feed for <u>new bucks</u>	\$	<u>2000.00</u>
			Total	\$	<u>14330.00</u>

Furnish separate expense budget form in all livestock loans over \$2500.00.

## FINANCIAL STATEMENT

No.	Assets	Value	Liabilities	Amount
	Cattle	\$	R. A. C. C. Loans	\$26000.00
4251	Sheep	\$20110.00	Other Encumbrances on Livestock and Machinery	\$ 9000.00
39000	Unsold Wool	\$ 8500.00	Lewistown Life Ins. Co.	\$10,000.00 also security to this
30	Horses and Mules	\$ 1125.00	Life Against Crops loan	\$
	Grain for Sale	\$	Federal Seed and Feed Loans	\$
	Grain for Feed and Seed	\$	Rent and Leases Payable	\$
265	Hay (tons)	\$ 2650.00	Taxes Unpaid	\$ 300.00
1420	Ewes sold Government	\$ 2840.00	Real Estate Mortgages	\$
	Machinery	\$ 2500.00	Past Due Interest on Real Estate Mortgages	\$
	Life Ins. to offset		Other Indebtedness Liability on	\$
	Natl. Bank Debt	10000.00	Bond securing Judith Basin	\$
	Real Estate - Acres 320 offered to	\$	County Bank deposit	\$ 4000.00
	Description:		TOTAL LIABILITIES	\$39300.00
	Judith Basin Co. as offset	4000.00	Net Worth	\$2425.00
	to their claim.		Total	\$ 17560.00
	Other Assets	\$		
	TOTAL ASSETS	\$51725.00		

(5) State number of acres and kinds of crop next maturing 800 acres hay

How many acres under cultivation? \_\_\_\_\_ Acres summer fallowed? \_\_\_\_\_ Acres irrigated? 900 Acres grazing? 6000

State kinds of grain and amount you are reserving for seed none

State amount of hay and other feed now on hand 265 tons hay & grass

(6) State amount Government wheat allotment allowed you \$ none Amount received \$ \_\_\_\_\_

(7) Have you procured feed or seed advances from Federal or County in previous years? No.

(8) List any contingent liabilities that you have Judith Basin Co. Bank deposit bond \$4000.00

(9) Are there any judgments or suits pending against you? No

(10) If so, in what court docketed and present status? None

(11) Have you ever taken bankruptcy? No.

(OVER)

WITHDRAWN

Date Feb 1 1935



(12) What mark and brands do you use?

Z in point on back

(13) Give recorded mark and brand certificate number. none

(14) I further state that I am the sole owner of the livestock described herein except as to the liens set out and am entitled to pledge same for the loan applied for, and that a CHATTEL MORTGAGE CONVEYING A FIRST LIEN WILL BE GIVEN COVERING THE FOLLOWING LIVESTOCK:

KIND	BREED	BRAND	NUMBER	VALUE PER HEAD	TOTAL VALUE
Steers 1's					
Steers 2's					
Steers 3's and over					
Heifers 1's					
Heifers 2's					
Cows 3's to 7's					
Cows over 7					
Calves					
Bulls					
Other cattle					
Ewe Lambs (1934)	Ramb.	Z	1713	3 00	5139 00
Yearling ewes	Ramb.	Z	200	7 00	1400 00
Breeding " 2 & 3	Ramb.	Z	200	7 00	1400 00
" " 4 & 5	Ramb.	Z	750	5 50	4125 00
Old " 6's	Ramb.	Z	1186	3 00	3558 00
Wethers Lambs	Ramb.	Z	114	2 00	228 00
Bucks	Ramb.	Z	88	20 00	1760 00
Work Horses			15	50 00	750 00
Other Horses			15	25 00	375 00
Mules					
Mch'y & Equipment					2500 00
TOTAL			4281		21235 00

Estimated calf tally for next year:

calves @ \$ each.

\$

2336 breeding ewes will produce about 2000 lambs

@ \$3.50 each, available by

October 15, 1934

\$7000.00

4251 sheep to be sheared.

Estimated clip 42,000 lbs.

@ 25 cents per lb.

\$10500.00

TOTAL, \$

No. 9956  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
FILED

OCT 23 1941

PAUL P. O'BRIEN  
CLERK

(15) Is there any livestock or personal property on premises not listed in this statement which is not owned by you? No  
If so, give particulars.

(16) What arrangements, if any, for making all or part of your operating expenses outside of livestock? None

(17) Life Insurance. Yes Amount, \$15,000.00 Company Montana Life Insurance Co.

(18) Who is the beneficiary? National Bank of Lewistown, \$10,000.00; My daughter, \$5000.00.

The undersigned agrees that if this renewal application is accepted he will reimburse the corporation for its regular inspection costs (if required) by remittance directly to the corporation of its office in Helena, Montana, or by permitting said costs to be added to the existing principal indebtedness and to be included in the lien of any mortgage given the corporation by the undersigned. The undersigned further agrees, as a part of the consideration of renewal of his loan from the Regional Agricultural Credit Corporation of Spokane, Washington, that upon the request of the said corporation (either before or after the maturity of said renewal loan) he will promptly take all necessary action (including execution of all necessary documents) to refinance the indebtedness owed this corporation either by a loan from a Production Credit Association organized under the Farm Credit Administration, or from some other source. That, in the event of any breach of this undertaking by the borrower, the lender may take any action which it would be entitled to take under said mortgage or mortgage securing such renewal loan for the breach of any condition or covenant therein contained, all of which said covenants and conditions are hereby incorporated herein by reference, to the same extent as if fully set out herein.

#### FOR INFORMATION OF APPLICANT:

Section 16 (a) of the R. F. C. Act provides:

Whoever makes any statement knowing it to be false, or whoever willfully over-values any security, for the purpose of obtaining for himself any loan, or for the purpose of influencing in any way the action of the corporation, or for the purpose of obtaining money, property, or anything of value under this Act, shall be punished by a fine of not more than \$3,000 or by imprisonment for not more than two years, or both.

The undersigned hereby certifies that he has read this application and knows the contents thereof, that each and every statement contained in this application and the financial statement are true of his own knowledge, and that the answers to the within questions have been made for the purpose of obtaining a renewal of his existing indebtedness to the Regional Agricultural Credit Corporation of Spokane, Washington, Helena, Montana, Branch.

Witness:

(Signed)

Each and every question must be answered plainly and definitely. If the question can not be answered, a statement should be made accordingly.





(Testimony of W. E. Robinson.)

The Court: Very well, let it be received.

Q. Simon Douglas fell sick some time in December, 1934, didn't he? Or you state what your recollection is?

A. I believe it was about that time.

Q. At the time he fell sick did your relationship change? A. Yes.

Q. In what way?

A. He was taken quite badly sick and the Regional I believe demanded some one be placed in charge as overseer on account of his condition. He, more or less, objected to this, in a way. He didn't hurry about doing it but finally Mr. Douglas thought it would be suitable to give me a power-of-attorney in order to keep the bills paid, with the understanding that Tom White, the foreman on the ranch, would continue to physically look after the sheep and care for them.

Q. Showing you Defendant's Exhibit "8", is that the power-of-attorney you just referred to?

A. That is a copy of the power-of-attorney; it is not the original; it is a carbon copy.

Q. I call your attention to the signature. Can you say whether that is the signature of Simon Douglas? A. It is. [177]

Q. And you will observe also this is the original notarial certificate? A. Yes sir.

Q. So the document is actually a carbon copy but it is executed as an original.

A. No answer.



(Testimony of W. E. Robinson.)

Mr. Van Cott: I offer Defendant's Exhibit "8" in evidence.

Mr. DeKalb: No objection.

The Court: Let it be admitted.

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### DEFENDANT'S EXHIBIT 8

Know All Men by These Presents:

That I, Simon Douglas, of Armells, Fergus County, Montana, have made, constituted and appointed, and by these presents do make, constitute and appoint W. E. Robinson, of Lewistown, Fergus County, Montana, my true and lawful Attorney for me and in my name, place and stead to handle and manage all of my sheep ranching business in the State of Montana, to lease any and all real estate for said purpose that he may think proper and on such terms and conditions as in his judgment may be to the best advantage of myself and said business and for such time as in his judgment may be for my best advantage; to buy and sell sheep for my account at such times and at such prices as he may deem best; to borrow money from the Regional Agricultural Credit Corporation, of Helena, Montana, or from any other corporation, person or agencies that he may deem advisable, giving him full power to sign and execute notes and mortgages, to secure said notes, signing my name by himself

(Testimony of W. E. Robinson.)

as attorney, it being my express intention to give my said attorney full and complete power to bind me by said transactions as fully as I might bind myself by signing and executing said documents personally; to bargain, contract, agree for, purchase, receive, and take possession of all lands and property of every form and description necessary to carry on the said sheep business and to lease, let, demise, release, mortgage and hypothecate all such property, including sheep, lambs and wool upon such terms and conditions and under such covenants as he shall deem satisfactory and proper; also to bargain, agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with choses in action and other property in possession or in action, and to make, do, and transact all and every kind of business of every nature and kind whatsoever, and also for me and in my name and as my act and deed to sign, sell, execute, deliver and acknowledge such deeds, agreements, mortgages, hypothecations, bills, notes, receipts, evidences of debt, releases and satisfactions of mortgage, judgments, and other debts, and such other instruments in writing of whatever kind and nature as may be necessary and proper in the premises, and I hereby expressly empower my said attorney to deposit moneys that he may receive in connection with said business in the National Bank of Lewistown, Montana, or any other bank that he may

(Testimony of W. E. Robinson.)

see fit, and also for me and in my name and as my act and deed to sign and draw checks on my account in said bank or any other bank, and do any and all things whatsoever in the handling and management of my sheep and all other property used in connection with my said sheep business that he may think or deem advantageous to me. I also hereby expressly empower my said attorney in fact in my name, place and stead, and as my act and deed, to employ all help, herders, that he may deem necessary for the conduct of said business and I also give him full authority to dismiss any or all such employees or help that he may deem fit and proper at any time for any reason. It is my express intention to give my said attorney in fact, full and complete power to manage my said business, and to execute any and all instruments whatsoever in my name, place and stead and in such form as may be required to give full and complete effect to the foregoing power herein granted, giving and granting unto my said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes, as I might or could do if personally present, hereby ratifying and confirming all that my said Attorney W. E. Robinson shall lawfully do or cause to be done by virtue of these presents.

(Testimony of W. E. Robinson.)

In Witness Whereof, I have hereunto set my hand and seal this 22nd day of December, A. D. one thousand nine hundred and thirty-four.

(Seal)                      SIMON DOUGLAS

Signed, Sealed and Delivered in the Presence of

.....

.....

State of Montana,  
County of Fergus—ss.

On this 22nd day of December nineteen hundred and thirty-four before me Oscar M. Ulsaker a Notary Public in and for the State of Montana, personally appeared Simon Douglas, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal the day and year in this certificate above written.

(Seal)                      OSCAR M. ULSAKER,  
Notary Public for the State of Montana.  
Residing at Lewistown, Montana.

My commission expires January 19, 1937.

—————

Q. After that power-of-attorney was executed and delivered just what did you do with respect to the Simon Douglas outfit there from that time on until his death?

(Testimony of W. E. Robinson.)

A. I received reports from Tom White as to how he was getting along to pay the wages of the men employed in taking care of the sheep.

Q. What did you do with respect to advances made by the Regional for operating expenses?

A. That money was placed in the National Bank at Lewistown under the name I believe of Simon Douglas, the signature to be by me as attorney-in-fact.

Q. What did you do with respect to keeping the bills paid?

A. We very carefully tried to keep all bills paid to date as near as we could on account of the condition of Mr. Douglas. Shortly before he died, a few days, Mrs. Worthington called me from Great Falls, where he was in the hospital, reporting that he was very low. Mr. White happened to be in town that day, and we figured up the pay-roll to date and made out checks which he took to the ranch and had endorsed by the men working there and then got the checks cashed prior to Mr. Douglas' death so that the laborers and herders would, at least, be paid [178] as near as we could possibly pay them.

Q. Now, after the death of Simon Douglas did you continue to manage his outfit?

A. I did not.

Q. You ceased your connection with it at the time of his death?

A. Yes sir.



(Testimony of W. E. Robinson.)

Q. Do you know who assumed responsibility for the expense of the labor and supplies?

A. I notified Mr. Cooper, who was 'there, and he had charge from that point.

Q. Did you advise with Mr. Worthington, following the death of Simon Douglas, whether or not they should carry on this outfit?

A. I met them in Great Falls. I happened to be going through Great Falls to Helena. First I talked to them when they came to Lewistown after his death, and they discussed it somewhat at that time, and later I met them in Great Falls when I was going to Helena on other business. That is when Mr. Worthington wanted to go along and talk to Mr. Pigott about the situation with the regional.

Q. You were in the conference that has been described here between Mr. Pigott, and Mr. Worthington and yourself, were you?      A. Yes sir.

Q. Do you know that the foreclosure sale, there was notice given of the foreclosure sale?

A. Yes sir.

Q. Prior to the foreclosure sale did you make efforts to try to sell the outfit as a whole?

A. I tried to arrange to have it bid at the sale.

Q. What?

A. To have it bid at the sale. I was trying to line up [179] some prospective buyer or a credit so we could possibly have it bid at the sale.

Q. Describe to the Court what that effort consisted of?



(Testimony of W. E. Robinson.)

A. I talked to Mr. Yeager about the deal.

Q. That is one of the witnesses that was on the stand?

A. Yes sir.

Q. All right, proceed?

A. We went into the matter whether it might be possible for him to buy the sheep. He attempted to get a loan. I understand there are several Yeager brothers, I was, more or less, dealing with George Yeager; he was the main man I was talking with. He in turn attempted to establish a credit so he could take most of the outfit over and was never able to establish this credit so he was unable to make a bid. I had no other outlet for the sheep.

Q. If he had succeeded in getting that loan it was from the P. C. A., he was applying to for that loan, was it?

A. Yes, he was trying to get it from the P. C. A. Whether or not he tried anywhere else, I am not sure.

Q. The deal was, he would get enough of a loan so he would pay off the indebtedness and also pay for the five per cent stock in the P. C. A., is that it?

A. We were trying to establish a bid that would have cleared the indebtedness.

Q. And you failed in that?

A. We failed in that attempt.

Q. When did you finally know you had failed?

A. Shortly on the afternoon of the day of the sale.

(Testimony of W. E. Robinson.)

Q. Did you attend the sale?

A. I got there a little late. I believe the sale had actually started before I got there or it had just started. [180] I didn't go into the shed when I first got there where they were holding the sale.

Q. You observed the conduct of the sale, did you?      A. Yes sir.

Q. Will you describe the conduct of the sale to the Court, as to whether it was fair, or not, as to efforts to get bids and so on?

Mr. DeKalb: That would be calling for a conclusion of the witness, with respect to its fairness.

The Court: Yes, I think so.

Q. Did you go in later?

A. I went in later. I was not at the sale long enough to form an opinion.

Q. What was the condition of the sheep in the Simon Douglas outfit at the time of the sale?

A. I was not in the shed long enough to look at the sheep. I didn't see them at that time. I saw the sheep,—I made one trip up to the ranch and they were in fair condition.

Q. How was the herd as to ages of ewes?

A. I never mouthed the sheep, and my knowledge of their ages was based mostly on what Mr. Douglas had told me about them, the same as that reported.

Q. I call your attention to the application for the loan, dated November twenty-seventh, 1934, Defendant's Exhibit "9", and to the number of year-

(Testimony of W. E. Robinson.)

ling ewes and twos and threes, shown in that application, with relation to those of older age, and ask you whether that is a well balanced herd?

A. It runs a little bit to the aged side.

Q. To the aged side? A. Yes sir. [181]

Q. What happens to a herd like that?

A. I don't understand the question.

Q. As the bids go up?

A. Some of them are too old.

Q. Were you familiar with the market value of sheep in Fergus County in February, 1935?

A. I believe so.

Q. You have heard the evidence here to the effect that these 1453 ewe lambs sold for \$4.10 a head, have you not? A. Yes sir.

Q. Will you tell the Court what in your opinion was the fair market value of ewe lambs of that description in February, 1935 in Fergus County?

A. I felt that the ewe lambs sold for all they were worth. I base ewe lambs the same as every one does. The price of lambs is equal to the price of yearlings, and on that basis the ewe lamb would be worth from \$4.00 to \$4.50, possibly a slight premium, on account of the wintering that had been put into them.

Q. Describe that formula further, will you?

A. These lambs were not particularly big lambs. I weighed the wether lambs at the time they were sold. They weighed in the neighborhood of 61 pounds. Ewe lambs as a rule run a little lighter.

(Testimony of W. E. Robinson.)

Very often they shrink after being weaned from their mothers, unless fed extra well. I suppose the ewe lambs weighed somewhere around 55 to 57 pounds, and I think the price of \$4.10 is a big price for a lamb of that weight, a very good price.

Q. How does it compare with what Simon Douglas sold his wether lambs for in the fall of 1934?

[182]

Mr. DeKalb: We object to that as too remote. It is a sale under different conditions.

The Court: I think so.

Q. How did the market in February, 1935 compare with the market in the fall of 1934?

A. Well, I don't remember but the Chicago market will show for itself.

Q. You don't remember then?

A. No sir.

Q. I call your attention to the sale to O. A. Nestad of 1080 head of ewes at \$2.25 a head, and to the testimony with respect to their classification, that there were 4 yearlings in the band and 22 twos, 68 threes, 185 fours, 347 fives and 422 classified as aged. I will ask you what in your opinion was the fair market value per head of a band of ewes of that character?

A. I believe it was a very fair value under the conditions and circumstances at the time.

Q. These prices that were received for them?

A. Yes sir.

(Testimony of W. E. Robinson.)

Q. What effect, if any, did the sale, the program of the United States Government in the fall of 1934 have on the price of old ewes?

A. Well, every one considered the price paid by the Government was excessive for old ewes, above the market.

Q. Calling your attention to the sale of 1238 ewes to Henry Lingshire at \$3.40 a head, and to the description of them which is in evidence, there were 20 yearlings, 203 twos, 423 threes, 240 fours, 205 fives, and 122 aged, and I will ask you what in your opinion was the fair market value per head of such a band of ewes? [183]

A. I believe it was a fair value because it was more than I could pay.

Q. \$3.40? A. Yes sir.

Q. More than you would have paid, if you had been in funds?

A. More than I could pay. I had no order. I couldn't handle them at that price.

Q. I understand your opinion is that was in excess of the fair market price?

A. I think it was a fair price for the ewes.

Q. I call your attention to the sale of 308 sacks of molasses cake at \$1.30 a sack, and I will ask you whether you had an opinion as to the fair value of molasses cake in February, 1935 in Fergus County?

A. I bought and paid for twenty tons which was shipped out there at a cost of \$43.00 a ton from the Montana Flour Mills.



(Testimony of W. E. Robinson.)

Q. When was that?

A. It was between the first and twentieth of December; it was shortly after I received the power-of-attorney. It cost \$43.00 a ton.

Q. Was there any difference in the market for molasses cake in February, 1935 as compared to what you knew about it?

A. From the elevator company?

Q. Yes?

A. I don't know. I don't know what the elevator company asked for it.

Q. In your opinion what was the fair value of that molasses cake at the time and place of the sale?

A. That would all depend on the demand. You either want it or you don't want it. Most men at that time of the year had purchased feed supplies for the winter, and perhaps [184] not as many people wanted the cake at that time as you would find earlier in the fall.

### Cross Examination

By Mr. DeKalb:

Q. I take it that as soon as Simon Douglas expired you were advised, of course, that your authority under the power-of-attorney had ceased?

A. Yes sir.

Q. You didn't attempt to exercise any further powers under that power-of-attorney?

A. No.



(Testimony of W. E. Robinson.)

Q. Did you follow up this Nepstad sale in any way? Do you know anything about if those sheep were sold a few days afterwards?

A. No sir. I had no connection with them.

Q. You were acquainted with George Yeager?

A. Yes sir.

Q. You were endeavoring to work out for George Yeager a purchase, work out the finances with which to purchase—?

A. With which to bid.

Q. These sheep, is that right?

A. We were trying to get some money together to make a bid.

Q. To get some money to bid. The final wash-up of it was that you were to dig up yourself in some way two thousand dollars of those funds. That was one of the final proposals, was it not?

A. That was the final proposal. The first one fell down, and then I offered to advance two thousand dollars on the deal, yes.

Q. You and Yeager acquainted yourselves with the value of this spread out there so you could act intelligently in putting it over, didn't you? [185]

A. Mr. Yeager inspected the sheep to his satisfaction. I never mouthed the sheep.

Q. You would have been in on the deal if it had been made, financially interested to the tune of two thousand dollars, would you not?

A. Not necessarily in the deal. I was willing to loan Yeager brothers two thousand dollars.

(Testimony of W. E. Robinson.)

Q. Well, you were counseling with him concerning the advisability of making this purchase?

A. Yes sir.

Q. And you and he put your heads together and you figured out what he could afford to pay for that bunch of sheep, the whole business?

A. Subject to his inspection of the sheep.

Q. And which he had satisfied himself about?

A. Yes sir.

Q. You were trying to arrange it so he could get to this sale, and if necessary pay for that band of sheep, \$18,400.00, that is a fact, is it not?

A. It was in the neighborhood of eighteen thousand dollars, I don't remember the exact amount. He was taking most of the lay out, not just the sheep.

Q. And then a thousand dollars was to be added to that for equipment that he was not going to buy on the basis of \$18,500.00?

A. He was going to add the extra thousand.

Q. Well, he was figuring on paying a thousand dollars more. You were going to put up some of that, were you not?

A. I don't remember that. I understood the equipment was in the deal. [186]

Q. All right, now, you men had passed judgment just a few days before the sale or a short time before the sale, and you, as Mr. Douglas' manager, were familiar with those sheep on the price of \$18,500.00, were you not?

(Testimony of W. E. Robinson.)

A. Not just the sheep, it was on the entire equipment.

Q. All right, let's put the whole business in at \$18,500.00. Were the horses in there?

A. I don't think so.

Q. The horses, at least, were out of the deal?

A. So far as I remember, they were.

Q. You fellows at that time, it was your judgment that those sheep had a value of \$18,500.00?

A. Well, it was mostly Mr. Yeager's judgment on the sheep.

Q. Is it not a fact, that you and Mr. Yeager pushed your pencils on this bunch of sheep and figured out at \$20,000.00 there would still be a profit on those sheep?

A. I don't remember ever figuring it up to \$20,000.00.

Q. Let me ask you, if the figures you used at that time you didn't figure on the wool which had a market at that time, wool was being consigned?

A. It was all based on what the future might have. The Yeagers agreed to furnish most of the labor which would eliminate most of the expense.

Q. You figured out, the two of you, a deal in which you would both be interested to some extent where you would have those sheep after the wool was marketed, and the lambs, the prospective lambs were marketed, you would have those sheep as an investment, this band of sheep practically intact, after carrying on through the years, as far as they

(Testimony of W. E. Robinson.)

would go, at about \$11,000.00, is that not a fact?

[187]

A. I don't remember how that figured out.

Q. You do remember however that you men figured this out, and where, if you could get hold of the money, where you could spring the deal, were willing to go out there and pay as much as \$18,500.00 for those sheep, that is a fact is it not?

A. I think we were trying to figure nearer \$18,000.00 than we were \$18,500.00.

Q. That was a sum in excess of the amount of the indebtedness?      A. Yes sir.

Q. Considerably in excess of the amount of the indebtedness?

A. We were figuring on paying the amount of the indebtedness.

Q. Taking your expression here about a fair price. You don't mean it was a top price or anything of that kind. You just say it was a fair price. You don't assume to say that in the judgment of sheep men, men who are experienced in the handling and buying and selling of sheep that price was an adequate price, do you?

A. What is the question?

Q. I will withdraw the question. The price that you men were willing to pay you considered a reasonable price for the stuff, did you?

A. Under the circumstances, it was a going concern and perhaps worth more money to Mr. Yeager than it was to the men that would have to pay cash

(Testimony of W. E. Robinson.)

and additional freight to take it away from there, that is true.

Q. You were not figuring on losing any money in making the deal for these sheep, were you?

A. You understand if there had been any lost Mr. Yeager, he would have done the losing, and if there was any gain, [188] he would have done the gaining.

Q. You don't know of any losses that were sustained by anybody in connection with this deal, except the creditors and heirs of the Douglas estate, do you?

A. The Regional I understand took a loss.

Q. And they have filed a claim against the estate, haven't they?      A. I don't know.

Q. Do you know Daley Johnson?

A. Yes sir.

Q. Do you know whether or not it is a fact that he made an offer to take over that whole spread for what was against it?      A. I do not.

Q. In your discussions of this prospective deal with Yeager you did not express to him any such view that those 1453 or 1080 ewes were worth \$2.25 a head, did you?

A. We figured all the time we would try and buy them as cheap as we could.

Q. Sure.

A. And this \$18,000.00 item was, more or less, as I remember it, our outside figure, as the outside limit.



(Testimony of W. E. Robinson.)

Q. You tried to borrow that much money?

A. Sure but we couldn't spend any more than we could borrow.

Q. What did you in your discussions, we will get at it that way, your discussions with Mr. Yeager put as a value on those 1080 head of ewes, what figure they were worth?

A. I haven't any figures on that. We did figure if we had the money that the set-up, the set-up on the ranch were perhaps worth more to him than to lots of people; he would not have the expense. He could step right in and go to work.

Q. That is what makes a market price; that is what gives [189] value to things somebody wants, is it not?

A. I always figured it is what somebody would pay for a thing.

Q. You are figuring the cost, if there was a sale in midwinter on a raw day, under conditions perhaps caused by some statements and expressions that were made, at least, to the persons conducting the sale, you consider whatever was bought under those conditions would represent the market value, is that what you base it on?

A. No, I base it on this. I couldn't buy the sheep, and I figure the man that did buy them at the top price perhaps was the market.

Q. You didn't have anybody qualify to make a bid there at that time?      A. No sir.



(Testimony of W. E. Robinson.)

Q. That has been your chief function at these sales, is to represent a client and make a bid within the orders of the client, has it not?

A. I don't attend very many public sales.

Q. You say you got there late?

A. I believe the sale was on. I talked with somebody at the car when I first drove up, I didn't go into the sale immediately. I didn't have anything to go in there for so I didn't go in.

Q. Let's get down to the matter of oil cake. You bought that oil cake at \$43.00 a ton?

A. Yes sir.

Q. So far as your recollection is concerned, that was not more than two or three weeks before this date, was it?

A. They needed some concentrates out there pretty badly and I bought them very shortly after I was given the power of attorney. [190]

Q. That would be between the twenty-second of December and the date of his death, or January twelfth?

A. They were bought the next few days afterwards.

Q. That oil cake was kept under cover, was it not?

A. Well, Tom White had charge of the oil cake, and I presume it was.

Q. It deteriorated in value from \$43.00 a ton to \$26.00 a ton on the day of this sale; that is what it brought at the sale, according to the figures. Do

(Testimony of W. E. Robinson.)

you know any reason for that, except a sacrifice sale of something of that sort?

A. The only reason I know was, nobody wanted it.

Q. Oil cake had a value on the market, didn't it?

A. That was the elevator price.

Q. That was the elevator price. It didn't fluctuate very much, did it?

A. I never bought oil cake before or since, I don't know.

Q. A man experienced with sheep would know about how the current price runs on oil cake, would he not?

A. I hear the sheep men that run sheep discuss it from time to time but I don't follow it very close.

Q. Oil cake has a stable price?      A. Yes.

Q. And depending on where you are, but in Fergus County the price of oil cake sits right at \$43.00 a ton, does it?

A. Some years it is higher than others.

Q. Yes. Here was a fluctuation from \$43.00 to \$26.00 a ton within a matter of about a month.

A. No answer.

### Redirect Examination

By Mr. Van Cott:

Q. I will call your attention to this document and ask you [191] if that refreshes your recollection as to the date of the purchase of the oil cake and molasses cake?      A. Yes sir.

(Testimony of W. E. Robinson.)

Q. What was the date? A. December 21st.

Q. Now, you stated that the person who buys the outfit as a unit gets with the unit a going concern value. Will you please explain what you mean by that?

A. I mean that the Yeager Brothers had they been able to buy the sheep could have taken them right where they were without any cost of moving them; without any extra freight. The plant was going and in operation. If they had been the successful bidders they could have taken them over with smaller effort than anybody else. Therefore, they might have been able to bid more than the other man because they would not have the extra expense incurred.

Q. That going concern value referred to is one of the values that is lost when there is necessity of selling the outfit in parcels, is that correct?

A. Naturally.

Q. Is that the difference between the cash value of the parcels of an outfit and the loan value on an operating basis?

A. I don't understand the question.

Q. Are there difference between the cash value of the parcels of an outfit, sold in parcels, and the appraised value for an operating loan?

A. I don't know. I am not in the loan business. I deal strictly on a cash basis.

Mr. Van Cott: That is all.

Witness Excused. [192]

WILLIAM RAGAN,

being called as a witness for the Defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. What is your name?

A. William Ragan.

Q. Where do you live? A. Townsend.

Q. What is your occupation?

A. Livestock feeder.

Q. What do you do in the livestock business?

A. Buy and sell.

Q. How long have you been doing that?

A. Twenty-five years.

Q. Were you present at the sale of the Simon Douglas outfit? A. Yes sir.

Q. What was your purpose in going there?

A. To buy some sheep.

Q. Did you bid on sheep there?

A. Yes sir.

Q. On what list did you bid?

A. I bid on all of them, that is, the three bands.

Q. That is the lambs and two bands of ewes?

A. Yes sir.

Q. How high did you go on the bidding on the lambs? A. I think it was \$3.50.

Q. Why did you stop?

A. Well, I didn't think they were worth any more. I didn't think I could make any money on them buying in high.

(Testimony of William Ragan.)

Q. You dropped out at \$3.50 and the sale was \$4.10? A. Yes sir.

Q. Have you an opinion as to the fair market value of those lambs in Fergus County on February fifth, 1935? A. I think so.

Q. What in your opinion was the fair market value? [193]

A. I think about \$3.50 a head.

Q. Did you bid on the small band of ewes the band of ewes that had 1080 in it? A. Yes sir.

Q. That is the one that was sold to O. A. Nepstad for \$2.25. What was the highest bid that you made?

A. I don't exactly recall but I think it was around \$2.00.

Q. Why did you stop at that point?

A. I thought they were high enough.

Q. Have you an opinion as to the fair market value of that band of ewes sold to O. A. Nepstad at \$2.25? A. Yes, I think so.

Q. What in your opinion was the fair market value?

A. I figured around \$2.00 a head to me.

Q. And the band of ewes consisting of 1238, did you make a bid on them? A. Yes sir.

Q. What was your highest bid there?

Mr. DeKalb: I object to what his highest bid was.

Q. Well, what bid did you make?

A. \$3.40 was the last bid.



(Testimony of William Ragan.)

Q. You were the successful bidder?

A. Yes sir.

Q. You were bidding for yourself and Henry Lingshire, were you?

A. We were buying them together.

Q. Did you observe the conduct of the sale throughout?      A. Yes sir.

Q. Will you describe the conduct of the sale to the Court?

A. Well, the sheep were offered in different bands and auctioned off like any other auction sale.

Q. Did you hear of any threats being made about the legality of the sale? [194]

A. I heard some talk but I didn't hear it directly and I didn't pay much attention to it.

Q. Did it affect you in your bidding?

A. No sir.

### Cross Examination

By Mr. DeKalb:

Q. You got 1238 head for \$3.40 bid for you and Mr. Lingshire?

A. That is right. I don't remember the exact number, 1237 something like that.

Q. Well, around about that. It is reported in the return of the sale at 1238. You say you were buying and selling sheep, that is your business?

A. Yes sir.

Q. You sold that band, did you not?

A. Yes sir.



(Testimony of William Ragan.)

Q. A few days after the purchase?

A. That is correct.

Q. At a profit of Eighty Cents a head?

A. I sold them for \$4.25.

Q. You got them for \$3.40?           A. Correct.

Mr. DeKalb: That is all.

### Re-Direct Examination

By Mr. Van Cott:

Q. To whom did you sell these sheep for \$4.25?

A. Mr. Ebert.

Q. How were you able to make that sale?

A. I knew he was buying some ewes of that kind at that time and I got busy and got him on the telephone and got him over there.

Q. He was not at the sale?           A. No. sir.

Q. I should have asked this question before on direct [195] examination, of the young sheep in the band you bought, state whether or not any of them were cut-backs?

A. I figured the young sheep in there was the poorest in there for quality.

Q. What do you mean,—well, in what respects?

A. They looked like they grew up from cut-back lambs.

Q. What do you mean?

A. Well lambs that would not be big enough to go in the fall.

Witness Excused.

DALEY JOHNSON

being called as a witness for the Defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. State your name? A. Daley Johnson.

Q. Where do you reside?

A. Melville, Montana.

Q. What is your occupation?

A. I am a rancher.

Q. How long have you been engaged in that business?

A. In the ranching business, I don't know—more or less, all my life.

Q. Did you attend the sale of the Simon Douglas outfit? A. I did.

Q. For what purpose did you go there?

A. I went there to buy sheep.

Q. Did you make any bids? A. I did.

Q. What did you bid on?

A. I bid on the first band of sheep that come up, the yearling ewes?

Q. That is the larger band of ewes?

A. No, the yearling ewes. [196]

Q. That is the lambs?

A. Yes, they were coming yearlings.

Q. You were the successful bidder on them at \$4.10, were you? A. I was.

Q. Did you bid on anything else, except them?

A. No, I didn't.

(Testimony of Daley Johnson.)

Q. You are a son-in-law of O. A. Nepstad?

A. Yes sir.

Q. He was present at the sale, was he?

A. He was.

Q. He made a bid on the small band of ewes?

A. Yes sir.

Q. At \$2.25 a head?           A. I think so.

Q. That was the successful bid, was it?

A. That was the successful bid.

Q. Do you know what disposition he made of those ewes?           A. They were sold.

Q. To whom?

A. They were sold to Frank Birkinbine.

Q. The man who testified here this morning?

A. Yes sir.

Q. What were the terms of that sale?

A. Well, I just can't remember that. There were two prices. The older ewes went at one price and the younger ewes went at another price and I don't know either price.

Q. Can you recall what profit was made on the deal by Mr. Nepstad?

A. Mr. Nepstad and I were in together and we divided \$800.00 between us.

Q. That is, after buying them at \$2.25 and then selling them? [197]

A. Well, eventually. We didn't get *out* money out of these sheep until the following fall, September or October, the next year.

(Testimony of Daley Johnson.)

Q. So this profit you got was a credit proposition that you didn't realize on until the next fall?

A. Yes sir.

Cross Examination

By Mr. DeKalb:

Q. You got interest on it in the meantime, did you not?      A. No.

Q. It was sold without interest?      A. Yes.

Q. You extended credit without interest?

A. The way the deal was, these sheep were sold to Mr. Birkinbine, as he told you this morning, and they bounced around the country two or three days before they landed, and the price we received for the sheep was not paid until the sheep were re-sold and re-sold along in September or October the same year following.

Q. Did you discuss this with anybody before the sale, the purchase of the sheep before the sale?

A. I was told about the sale by Mr. Robinson who just testified.

Q. Did you discuss what you were going to do or expected to do, after the sale with him?

A. I don't know as I did. I talked with him at some length about everything. The chances are we discussed those things but they are of no importance. I can't recall any specific thing that was said.

Q. You don't recall discussing with him, or with anybody, and in that discussion making the state-

(Testimony of Daley Johnson.)

ment that you [198] would offer to take over the whole spread for what was against it?

A. Yes, I would have. If we had the money I would have bought that outfit as it stood.

Q. You figured if you bought it for what was against it, some thousand dollars more than it brought, you would have made some money off it, you figured it that way, did you not?

A. Yes, I guess so.

Q. You were not going to buy it if you thought you were going to take a loss, were you?

A. No.

Q. You figured it was worth more money than what there was against it, is that correct?

A. Well, yes.

Q. And if you had the money you would have made a bid of that kind on it?

A. Yes sir.

Mr. DeKalb: That is all.

### Redirect Examination

By Mr. Van Cott:

Q. You thought if you got the outfit on those terms you would be able to operate it with a profit, is that it?

A. Yes. No, I would not have stayed there and operated that outfit very long. Conditions were changing and it looked to me like things were on the up-grade. There was the possibility of a profit

(Testimony of Daley Johnson.)

in there with a lot of hard work and grief and taking some chances.

Q. What kind of a chance?

A. Weather and markets.

Q. You figured if you got in there and took your chance on the market and weather, and put in a lot of hard work you probably could make a profit?

A. I was satisfied I might. [199]

Q. When did you state to any one you would be willing to do that?

A. I don't recall just when it was but I remember I spoke to Mr. Robinson.

Q. When with reference to the date of the sale?

A. I think it was probably at the sale or previous, I don't know.

Q. To whom did you make the statement?

A. Mr. Robinson.

Q. You didn't have the cash to buy it?

A. No.

Q. You heard the testimony of Mr. Cooper that he offered it for sale?

A. Yes sir.

Q. As a unit?

A. Yes sir.

Q. If you had the cash you could have bought it at that time, couldn't you?

A. I didn't hear him offer it.

Q. If he did, you could have?

A. Yes sir.

Q. What you wanted was credit?

A. Yes sir.

Q. You didn't ask for the credit until you reached there the day of the sale, did you?



(Testimony of Daley Johnson.)

A. I had not applied. I didn't have that much money, and I had not applied to anybody for it because I didn't know the sale was coming up. I was not prepared to buy anything except about one band of sheep.

### Recross Examination

By Mr. DeKalb:

Q. This Robinson you talked to was the Robinson who conducted the sale?      A. Yes sir.

Q. That was W. E. Robinson of Lewistown, was it not?      A. I talked to both of them.

Witness Excused. [200]

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### M. W. WILDSCHULTS

being called as a witness for the Defendant, and being duly sworn, testified as follows:

### Direct Examination

By Mr. Van Cott:

Q. State your name?

A. M. W. Wildschults.

Q. Where do you reside?

A. Lewistown, Montana.

Q. What is your occupation?

A. Dealing in livestock.

Q. Was it such in February, 1935?

A. Yes sir.

(Testimony of M. W. Wildschults.)

Q. Did you attend the sale of the Simon Douglas outfit?      A. I did.

Q. For what purpose?

A. I was going to buy some horses, and anything that was cheap.

Q. Buy sheep, if they were cheap enough?

A. Buy sheep, if they were cheap enough.

Q. Were you prepared to pay cash for whatever you bid on?      A. Yes sir.

Q. What did you bid on?

A. On that ten and some bunch of ewes.

Q. The smaller bunch of ewes?

A. The smaller bunch of ewes.

Q. How high did you go on them?

A. They sold for \$2.25. My bid was five or ten cents below that.

Q. Why did you quit?

A. That was all I cared to go.

Q. Did you bid on anything else?

A. I bid the horses.

Q. The record shows you bid 21 horses for \$360.00?      A. Yes sir. [201]

Q. What did you do with them?

A. I re-sold them.

Q. In a lot or in parcels?

A. In parcels.

Q. Over what period of time?

A. I think I had most of them sold in a month or two.

(Testimony of M. W. Wildschults.)

Q. How did you come out?

A. I lost \$50.00.

Q. Did you notice the conduct of the sale?

A. Yes sir.

Q. How was it?           A. Very good.

Q. Did you hear anybody making any threats about the legality of the sale?

A. I didn't hear it directly. I heard it indirectly.

Q. Did you pay any attention to it?

A. No sir.

Mr. Van Cott: That is all.

Mr. DeKalb: No cross examination.

Witness excused. [202]

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### JOHN G. CAMERON

being called as a witness for the Defendant, and being duly sworn, testified as follows:

#### Direct Examination

By Mr. Van Cott:

Q. State your name?

A. John G. Cameron.

Q. Where do you reside?

A. Great Falls.

Q. What is your occupation?

A. I am in the livestock loan department of the Montana Bank and Trust Company.

Q. What was your occupation in February, 1935?

(Testimony of John G. Cameron.)

A. I was Secretary and Manager of the Stockmens Finance Corporation at Cascade, Montana.

Q. Was R. I. Balch a borrower of that concern?

A. Yes sir.

Q. Borrowed on the security of chattel mortgages on sheep? A. Yes sir.

Q. Did you attend the sale of Simon Douglas outfit? A. Yes sir.

Q. With whom did you go there?

A. With Robert Balch.

Q. What was your purpose of going there?

A. I attended the sale at Mr. Balch's request.

Q. Mr. Balch was going there as a bidder, was he? A. Yes sir.

Q. If he had been a successful bidder you would have financed it, would you? A. Yes sir.

Q. That was the understanding?

A. Yes sir.

Q. Did you observe the sale?

A. Yes sir.

Q. How was it conducted?

A. I thought the livestock was offered for sale in an attractive way. They were offered in lots; that would [203] be attractive to the average purchaser.

Q. Was time given to bidders to make their calculations? A. Yes sir.

Q. Plenty of time? A. Ample time.

Q. Ample time to make investigation, if desired?

A. Yes sir.

(Testimony of John G. Cameron.)

Q. I call your attention to the sale of lambs at \$4.10 per head. Were you familiar with the market value of lambs and sheep in Fergus County, Montana in February, 1935?

A. I would say fairly well, yes.

Q. What in your opinion was the fair market value of those lambs at that time and place?

A. I base my opinion on them on the weight of the lambs, around six to seven cents a pound.

Q. What would that——?

A. I estimated the lambs to weigh under sixty pounds.

Q. What would that make those lambs come to?

A. Between \$3.50 and \$4.00.

Q. That is your opinion of the fair market value at that time?      A. Yes sir.

Q. I call your attention to the sale of the small band of ewes at \$2.25 per head. In your opinion what was the fair market value of those ewes in Fergus County, Montana in February? Have you the band of ewes in mind?      A. Yes sir.

Q. They consisted of 4 yearlings, 22 two years old, 68 three years old, 185 four years old, 347 five years old and 422 aged. Have you an opinion as to the fair market value of those ewes?

A. I think the young ewes in there was a little under size. [204] They were not as desirable in quality as the older ewes. Neither Mr. Balch nor myself were interested in that particular band.

(Testimony of John G. Cameron.)

They were aged and I didn't give them much consideration.

Q. The other band, do you have an opinion as to the market value of that band, the other band that had more of the younger sheep in it, the one that sold for \$3.40 a head, do you have an opinion as to the fair market value of that?

A. Averaging out the classifications of the band, I would say around \$3.00 to \$3.50.

### Cross Examination

By Mr. DeKalb:

Q. Where did you say your headquarters are, Choteau?      A. Great Falls.

Q. Did you ever attend any sales in Fergus County before?      A. No sir.

Q. That is your first trip out in that country?

A. That was the first time I was out there.

Q. Did you arrive there before the sale had started?      A. Yes sir.

Q. How long before?

A. We left Lewistown that morning, I think we arrived there about ten or eleven o'clock.

Q. The sale started at two?      A. Yes sir.

Q. What did you do in the meantime after arriving there?

A. We walked around the place and looked at the stock; as I remember, the sheep were coming in there; the last band came in around noon.



(Testimony of John G. Cameron.)

Q. Did you see any of them mouthed? [205]

A. I think I mouthed about twenty-five head to get an idea what they were.

Q. Did Mr. Balch, that was interested in buying?  
A. Yes sir.

Q. Why did you accompany him?

A. I was indirectly interested to the extent of wishing to make Mr. Balch a loan to purchase these sheep.

Q. If he had bought those sheep at the price you thought they should be bought for you would have financed him, would you?

A. I was not really concerned what he paid for the sheep. We were ready to finance the loan.

Q. On the basis of a chattel mortgage to you?

A. A chattel mortgage.

Q. In making a loan of that kind, I presume you don't loan a man one hundred per cent of the value, do you?  
A. No sir.

Q. You hold that down to about thirty to forty per cent on livestock, do you not, or less?

A. Probably fifty to seventy per cent.

Q. So that you were looking at these values practically from the standpoint of loan values, were you not?

A. Well, Mr. Balch had sufficient cash to make an attractive loan, and our company would have had a good loan.

(Testimony of John G. Cameron.)

Q. He would have put some cash into the proposition? A. Yes, he would.

Q. So anything he would have bought there you would have taken a mortgage on it for approximately what you have stated you keep your percentages to? A. Yes sir.

Witness excused. [206]

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R. I. BALCH

being called as a witness for the Defendant, and being duly sworn, testified as follows:

Direct Examination

By Mr. Van Cott:

Q. State your name?

A. My name, R. I. Balch.

Q. Where do you reside?

A. Near Cascade.

Q. What is your occupation?

A. I am a stock man.

Q. How long have you been engaged in that occupation?

A. Since I have been at Cascade, for the last twenty years.

Q. You are the Mr. Balch referred to by Mr. Cameron who was just on the stand?

A. I am.

(Testimony of R. I. Balch.)

Q. You went with Mr. Cameron to the Simon Douglas sale, did you?

A. Well, he went with me.

Q. Were you adequately financed to buy anything you desired to at that sale?

A. Yes sir.

Q. Mr. Cameron was ready to loan you any money that you needed, is that right?

A. Yes sir.

Q. You were not limited to forty per cent of the value, were you?      A. No sir.

Q. Did you make any bids?      A. I did.

Q. What was the first lot you bid on?

A. The first lot I bid on was what was known as the young band or larger band. It was the second bunch that was sold, I believe.

Q. What was your bid?

A. If I am correct, I think I was the next bidder to the man that bought the sheep.

Q. The record shows they sold for \$3.40?

A. My bid would have been \$3.30 or \$3.35.

Q. Why did you quit? [207]

A. Well, they got as high as I wanted to go.

Q. What else did you bid on?

A. I placed a bid I think on the ewe lambs.

Q. What was your bid on those?

A. I don't remember that but I know they got higher than I wanted and I was not interested and I dropped out, and I was not a bidder at the latter part of the sale.

(Testimony of R. I. Balch.)

Q. What was the condition of what they called the old band of ewes, the physical condition?

A. Well, to me their condition was poor.

Q. Is that why you didn't bid on those?

A. Well, I don't like old sheep any way, and that is one reason why, yes.

Q. Did you observe the conduct of the sale that day?      A. Yes sir.

Q. Did you hear any threats about the sale being illegal?      A. No.

Q. You were not affected by that?

A. No sir.

Mr. Van Cott: That is all.

Mr. DeKalb: No cross examination.

Mr. Van Cott: Take the stand again.

Q. Following this sale, did you make a purchase of ewes in the vicinity of Lewistown?      A. No.

Q. Did you any place?

A. Yes, I did buy some ewes about a month later.

Q. How many did you buy?

A. I can't remember the exact amount. It was a band approximately from ten to twelve hundred.

Q. Describe the ewes in that band?

A. The ewes in that band were straight threes and fours. [208]

Q. What was their condition as to flesh?

A. Very good.

Q. How did this band compare in age and con-

(Testimony of R. I. Balch.)

dition with the band you made the unsuccessful bid of \$3.30 on?

A. I didn't have the opportunity to go through the band at Lewistown, and I went through the band I bought and knew what I was buying, and they were bigger and better ewes; they were threes and fours.

Q. Were you given an opportunity of sorting them?

A. Yes, I mouthed out these I didn't want.

Q. What did you have to pay for those?

A. Well, I can't remember that exact figure but it runs in my mind it was \$3.60 to \$3.75, f. o. b. yards at Blackfeet, Montana.

Q. \$3.60 to \$3.75?      A. \$3.60 to \$3.75.

### Cross Examination

By Mr. DeKalb:

Q. Who did you buy them from?

A. I bought them from Lampen, was the man that sold them to me. I think they call themselves the Pondera Sheep Company or Glacier Sheep Company, and Mr. Lampen in Great Falls, of the Great Falls Building & Loan sold them to me.

Q. Were they doing business over here the same as at Lewistown?      A. At Lewistown?

Q. Yes?      A. No.

Q. Whereabouts?      A. At Blackfoot.

Mr. DeKalb: Well, I move this testimony be

(Testimony of R. I. Balch.)

stricken. I understood the witness to say Lewistown in his testimony in chief. [209]

Mr. Van Cott: May I ask another question?

The Court: Yes.

### Redirect Examination

By Mr. Van Cott:

Q. How far is Blackfoot from Lewistown?

A. Well, Blackfoot must be in the neighborhood of I would say, at least, two hundred miles.

Q. What would be the difference, if any, in the value of ewes as compared to their value in Lewistown?

A. Well, to me I don't know how much it would be. There would be some freight difference.

Q. Depending on where you wanted them?

A. I wanted them at my ranch at Cascade, of course.

Mr. Van Cott: I submit, if the Court please, the testimony is competent.

The Court: If you bought them in Fergus County you would trail them home to your ranch?

A. No.

The Court: How far would you have been obliged to ship them?

A. I don't know where they would take them to but they would trail them somewhere fifteen or twenty miles out of Lewistown and they would come to Lewistown. I would not undertake to trail a band



(Testimony of R. I. Balch.)

of sheep that time of the year.

The Court: You have not shown the conditions were the same. I doubt if that is competent. Well, it may stand for what it is worth.

Q. What would be the difference of freight rates in shipping from the Simon Douglas ranch to your place, on the one hand, [210] and from Blackfeet to your place on the other?

A. I can't give you the accurate figure on that but I would estimate probably around ten or twelve cents a head.

Q. Comparing the freight rates between the two places?

A. That is what I mean, ten cents a head difference.

Q. That difference would be a greater rate from Blackfeet or a greater rate from the Simon Douglas ranch?

A. From the Simon Douglas ranch.

Q. You would get them from Blackfeet to your ranch cheaper?

A. Yes, sir, and more direct route; there is no transfer of the cars from one to the other.

Witness Excused

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Mr. Van Cott: We rest.

The Court: Any rebuttal?

Mr. DeKalb: I think not. If we may have a recess

(Testimony of R. I. Balch.)

of about three minutes, we will consult.

The Court: Well, we will take a short recess.

After Recess:

Mr. DeKalb: May it please the Court, there is annexed to the Reply in the case a copy of a chattel mortgage, dated in December, 1934. We have a stipulation of Counsel as to its authenticity. I want to offer it in the case just as is. I don't think we need to bother to segregate it from the Reply.

The Court: Very well.

Mr. DeKalb: And we offer that.

The Court: You stipulate that you have no additional evidence? [211]

Mr. Van Cott: That is correct.

Mr. DeKalb: That ends the case, and we are through.

The Court: Well, after the testimony is written up you will need perhaps thirty days on a side, after receiving the transcript of testimony. Is that satisfactory?

Mr. DeKalb: Satisfactory.

Mr. Van Cott: Satisfactory.

The Court: The first brief comes up and reply brief fifteen days?

Mr. DeKalb: Yes, your Honor.

\* \* \* \*

[Endorsed]: Filed May 28, 1940. C. R. Garlow, Clerk. By C. G. Kegel, Deputy. [212]

Thereafter, on February 20, 1941, a

### MEMORANDUM OF DECISION

was duly filed herein, being the the words and figures following, to wit: [213]

[Title of District Court and Cause.]

Herein the plaintiff complains that before his appointment as administrator of the estate of Simon T. Douglas, Deceased, which occurred on April 4th, 1935, and before the appointment of any administrator or executor whatsoever, and after the death of said Simon T. Douglas which took place January 12th, 1935, the defendant, on or about February 5th, 1935, wrongfully took into its possession, sold, alienated, converted and disposed of to its own use certain personal property and effects of said decedent, set forth in the amended complaint, of which said Simon T. Douglas up to the time of his death, and his estate and plaintiff since that time, was and were lawfully possessed, of the value of \$35,500.20, and to the damage of the estate in double that value, all of which is alleged to be contrary to the provisions of Section 10140 Revised Codes of Montana, reading as follows: "If any person, before the granting of letters testamentary or of administration embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate."

Defendant denies the foregoing, except admitting the appointment of administrator. Then follows a lengthy recitation in a further answer, affirmative defense and cross complaint; that the defendant is duly organized and existing under and by virtue of Section 201 (e) of an act of Congress known as the Emergency Relief and Construction Act of 1932 (12 U. S. C. A. Sec. 1148) and has its principal place of business in the city of Helena, State [214] of Montana, and that it is an instrumentality of the United States Government; that all of the capital stock of the defendant corporation and all its property, including the note and mortgage involved herein, are beneficially owned by the United States, and that the corporation, under the authority conferred, has been engaged in the business of making loans on livestock and other personal property and taking notes and chattel mortgages as security therefor.

That on December 27th, 1933, said Douglas executed his promissory note to the defendant in the sum of \$17,000.00, due December 15th, 1934, and to secure the payment thereof and any additional advances, if any, not in excess of \$20,000.00, he executed and delivered to defendant, as mortgagee, his certain chattel mortgage, bearing said date, covering the livestock and other personal property therein described; that said mortgage was duly and regularly signed and acknowledged by said Douglas, and had endorsed thereon a written receipt by him

showing that a true copy of said mortgage has been delivered to him; there was also attached the required affidavit on behalf of the mortgagee, and the mortgage was filed in the office of the County Clerk of Fergus County, Montana, on January 8th, 1934.

That the said indebtedness was not paid at maturity, and on or about November 27th, 1934, said Simon Douglas made written application to defendant for a renewal and continuation of said mortgage indebtedness, and pursuant thereto executed a new note dated December 19th, 1934, and likewise a new chattel mortgage of even date therewith as security therefor, which was filed in the office of the County Clerk of Fergus County, Montana, on December 28th, 1934. It appears that no money was ever loaned and no advances ever made under the renewal loan because of the death of said Simon Douglas, who died intestate in Fergus County, Montana, on January 12th, 1935. It further appears that in making such loans the custom and procedure followed was to submit them for approval to the local counsel of defendant before they could be closed or completed. Defendant alleges that immediately after the [215] death of Simon Douglas it was necessary to employ help to care for and preserve the personal property described in the chattel mortgage dated December 27th, 1933, "for the reason that no heir of said Simon Douglas, nor any personal representative of his, nor any other person,



assumed or pretended to care for, protect or preserve such security, and that no person was appointed administrator of the estate of said deceased until on or about the 9th day of April, 1935." That on the date of his death said Simon Douglas was indebted to defendant in the sum of \$16,328.48, inclusive of interest at the rate of 6½ per cent per annum. Defendant alleges that in order to protect its security and the interests of the estate and in pursuance of the power of sale contained in the mortgage, the property therein described was sold at public auction to the highest bidder on February 5th, 1935, in accordance with the terms of said mortgage and as provided by statute; that the total gross amount received for the property at such sale was \$15,002.10, which defendant alleges "was and is the real and market value of said mortgaged property and all thereof on said date." That there was a balance of \$1694.64 owing defendant on the chattel mortgage indebtedness which was presented to the plaintiff herein as administrator of the Simon Douglas estate, and was not allowed, and judgment is asked on this amount, against plaintiff, with interest thereon at 6½% from February 5th, 1935, until paid.

Because of the strong reliance placed upon it by defendant in support of its contentions, the first case to be considered will be that of *Muth v. Goddard*, 28 Mont. 237, 72 Pac. 621, relative to the survival of the power of sale contained in a mortgage



after the death of the mortgagor, followed by other authorities of material interest in dealing with the theories and arguments of counsel. Whether the power of sale which was contained in the aforesaid chattel mortgage survived the death of the mortgagor seems to depend upon whether it was a power coupled with an interest.

In *Bell S. & C. M. Co. v. First National Bank*, 156 U. S. 470, 15 Sup. Ct. 440, 39 L. Ed. 497, cited in the Muth case, it was [216] held, in reviewing and affirming said case, found in 8 Mont. 32, 19 Pac. 403, that: "That power of sale in the indenture, whether we call it a deed of trust or a mortgage, does not change its character as an instrument for the security of the indebtedness designated, but it is an additional authority to the grantee or mortgagee, and, if he does not choose to foreclose the mortgage by any of the ordinary methods provided by law, he can proceed under the power added for the sale of the property to obtain payment of the indebtedness." The Montana Supreme Court said in the above case, which was affirmed as above noted: "But the mortgagee has an interest in the land mortgaged. He has a lien upon it for the security of his debt, and this will support the power of sale, and so couple it with an interest in the land that it becomes a part of the security and irrevocable."

As to the query, whether the power is one coupled with an interest and thereby survives the death of the grantor, Chief Justice Marshall held in *Hunt v.*

Rousmanier's Administrators, 8 Wheat. 174, 5 L. Ed. 589: "We hold to be clear that the interest which can protect a power after the death of a person who creates it must be an interest in the thing itself. In other words, the power must be ingrafted on an estate in the thing. The words themselves would seem to impart this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest."

Another well reasoned case, cited in the Muth case, is that of *Bergen v. Bennett*, 2 Am. Dec. 281, which held: "It is admitted that anaked authority expires with the life of the person who gave it; but a power coupled with an interest is not revoked by the death of the grantor. In my opinion, the power contained in the mortgage is of the latter description. A power simply collateral and without interest, or a naked power, is when, to a mere stranger, authority is given to dispose of an interest in which he had not before, nor hath by the instrument creating the power, any estate whatsoever. But when power is given to a person who derives, under the instrument creating the power or otherwise, a present or future interest in the land, it is then a power relating to the land." Would not the power of sale contained in the chattel mortgage in [217] question be governed by the same rules as those applied in a mortgage of real estate, and should not the power of sale be held to be coupled with an interest irrespective of whether it applied to the one or the

other. Does it not clearly appear that the interest involved in the power of sale whether contained in a mortgage of personalty or of realty is identical in effect, and would have to be construed as a power coupled with an interest, in either case.

In 2 Corpus Juris, page 1175, Sec. 86, the following appears: "Although ordinarily an agency is determined by the death of the principal, yet where the authority given the agent is auxiliary to an interest in the subject matter of the power, as considered in Sec. 75, and there has been such a transfer of an interest, or title, or beneficial interest, to the donee-agent of the power that he can exercise it in his own name, his agency will survive the death of the principal, unless such a power is expressly given only for the lifetime of the principal."

The concluding paragraphs in the Muth case read as follows: "From the foregoing authorities it clearly appears to us that the power of sale included in the trust deed in question is a power coupled with an interest; but, irrespective of this, the legal title to the property having passed to the trustee and from the mortgagor, the death of the latter could in no wise affect the trustee's right to carry out the trust which the mortgagor had reposed in him. It is argued, however, that foreclosing under a power of sale is inconsistent with our probate law, and that the mortgagee should enforce his rights either through the regular course of administration or by foreclosure in court. This argument cannot be

maintained. 'The law may suspend its own process. As it gives the process it may regulate it. But deeds of trust and mortgages with the power of sale arise from the consent and agreement of parties, and there is no propriety in depriving creditors of the fruits of their foresight and caution.' (*Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234.) The Texas cases cited by plaintiff are not in point. See in re *Horsfall's Estate*, 20 Mont. 495, 52 Pac. 199. It follows that the trustee or his successor in trust, having the legal title, could [218] execute the power of sale (a power coupled with an interest) without reference to the administration of the mortgagor's estate, if he so elected. (Code of Civil Procedure, Section 2603)."

The Muth and the Bell cases, *supra*, are cited in 41 C. J. 927 to sustain the rule that a power of sale in a mortgage is coupled with an interest and not affected by the death of the mortgagor. Also see 2 C. J. page 1175, Sec. 86, citing, among other cases, *Gardner v. Bank*, 25 Pac. 29, 10 Mont. 149. It was further held in the Ball case, *supra*, "\* \* \* But the mortgagee has an interest in the land mortgaged. He has a lien upon it for the security of his debt, and this will support the power of sale, and so couple it with an interest in the land that it becomes a part of the security, and irrevocable."

Counsel cites Jones on Chattel Mortgages and Conditional Sales, to the effect that the death of the mortgagor does not deprive the mortgagee of



his remedy by foreclosure and sale, either in equity under a power of sale, or under a statute; that he is not required to file his claim in the administration proceedings, but may proceed to foreclose by notice and sale, just as he might have done had the mortgagor survived. In *Mathew v. Mathew*, 71 Pac. 344, the court held: "The death of the mortgagor did not affect the rights of the mortgagee under the contract, and the executor possessed no new rights to the property, or to the possession of it, that were not in the mortgagor in his lifetime." The decisions referred to by counsel for the respective parties enable the court to determine with reasonable certainty when a power of sale survives the death of the grantor, but there appears to be nothing in the language of the decision in the Muth case, strongly relied upon by defendant, or in the other cases, even remotely hinting that a statute suspending the power of sale until the appointment of an administrator was in contemplation and held to be without force or virtue. The mortgagee's remedy by foreclosure and sale or under the power of sale or his rights under the mortgage would not have been impaired in any way by his observance of the provisions of Sec. 10, 140 R. C. M. [219]

The defendant has argued at great length his theory that the power of sale contained in the mortgage survived the death of the mortgagor, and this court is of the opinion that such power did so survive, but whether it did or did not so survive, seems

to be far from being determinative of the real issue in this case. The principal question here is whether section 10,140 R. C. M., heretofore quoted, should be applied and the double penalty enforced or whether it should be held for naught because of the claim of good faith on the part of the defendant. In citing *Jans v. Nolting*, 71 Pac. 344, defendant contends that the death of a mortgagor can not affect the rights of the mortgagee. But as it appears to the court, after the death of Simon Douglas and before the appointment of an administrator, the only control the defendant could exercise over the property of the deceased, described in the mortgage, was to possess and preserve it, awaiting the appointment of an administrator, as required by the provisions of the statute relating to the administration of estates of deceased persons, and especially the section heretofore quoted. During this period the power of alienation is suspended, and there seems to be no exception whatsoever. If the power of sale survived, as the court has held, it was suspended temporarily, until the appointment of an administrator to look after the interests of the estate. Having disposed of that feature of the case it will now be necessary to consider the defense of good faith on the part of the defendant in violating the plain provisions of section 10,140 R. C. M. A case relied upon by defendant to sustain its contention is that of *Delfelder v. Poston*, 293 Pac. 354, but an entirely different state of facts is there pre-



sented. In that case an agreement for the sale of the mortgaged property for \$140,000.00 was entered into with the mortgagor several days before his death, and the property was transferred to mortgagee according to the agreement, with the full acquiescence and approval of the widow who was thereafter appointed executrix. The property mortgaged was valued at \$93,000.00, and the amount credited on the mortgage was \$140,000.00, which was the sum agreed to by the mortgagor. Obvious reasons appear from a reading of the decision why the court declined to apply the double penalty. Many other cases have been examined with the result that the court is [220] convinced that the greater weight of authority, under like or similar circumstances, would require a strict observance of the statute in question.

It appears from the testimony that representatives of the defendant in making the sale were acting with knowledge of the provisions of law prohibiting the sale before the appointment of an administrator. At the time and place of sale there were present a lawyer, holding the office of County Attorney, and a banker from a near-by town, both of whom protested the sale as illegal before it was begun. It would seem that the representatives of defendant possessed information from a trustworthy source, and in any event were put upon enquiry, as to defendant's rights in respect to the sale of decedent's property before an administrator was appointed.

The court has considered the evidence in regard to the value of the personal property included in the mortgage and sold at public auction by representatives of the defendant, and is of the opinion that there is substantial proof to justify placing the value of the property sold, at the time of sale, at \$17,000.00, which is nearly two thousand dollars more than the price obtained at the auction sale aforesaid, which the court believes from the evidence was honestly conducted but under unfavorable conditions for such a sale. The statute in question directs that if any person alienates any of the moneys, goods, chattels, or effects of a decedent under the circumstances established in this case that he is charged therewith and liable to an action by the executor or administrator for double the value of the property so alienated, which would require the court in the instant case to award a judgment in favor of plaintiff in double the amount of the above sum, with costs, and it is so ordered.

Findings of ultimate facts and conclusions of law in accordance with the foregoing views may be submitted in compliance with the rule.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed Feb. 20, 1941. C. R. Garlow,  
Clerk. [221]

Thereafter, on March 5, 1941, Findings of Facts and Conclusions of Law were duly filed herein, being in the words and figures following, to-wit:

[222]

[Title of District Court and Cause.]

FINDING OF FACT AND  
CONCLUSIONS OF LAW

This cause came on regularly for hearing before the Court, the Hon. Chas. N. Pray, Judge of said Court presiding, on the 20th day of February, 1940, and the Plaintiff appearing by his attorneys, Raymond E. Dockery and H. Leonard DeKalb, and the Defendant appearing by its attorneys, W. Q. Van Cott, D. Eugene Livingston, and J. R. Wine, and witnesses having been sworn and examined for and on behalf of the respective parties, the case having been closed, and after the submission of briefs to the Court, and after due consideration of the said cause by the Court, this Court did on the 20th day of February, 1941, render opinion in this case resolving the issues in favor of the Plaintiff and against Defendant, and in accordance therewith the Court does now find and decide:

1. That one Simon T. Douglas died on the 12th day of January, 1935; that no administrator was appointed for his estate until the 4th day of April, 1935, at which time by proper proceedings in the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Fergus, E. B. Chapman, the Plaintiff herein, for and on behalf of said estate, was duly and regularly ap-

pointed as such administrator and thereafter continued at all times mentioned in the pleadings in this cause as [223] such and still is the administrator of said estate of Simon T. Douglas, deceased.

2. That the said Simon T. Douglas, during his lifetime and, to-wit, on December 27th, 1933, made, executed, and delivered to Defendant his chattel mortgage on certain sheep and other personal property securing a note payable to the Defendant herein in the sum of Seventeen Thousand (\$17,000.00) Dollars, providing for additional advances of Twenty Thousand (\$20,000.00) Dollars, which mortgage was made in conformity to the laws of the State of Montana, duly filed in the Office of the County Clerk and Recorder of Fergus County, Montana, the county in which said property was situate, the full particulars of which appear by copy thereof annexed to the pleadings herein; that under and by virtue of the terms of the said mortgage and note, the said obligation so secured fell due on the 15th day of December, 1934.

3. That prior to the death of said Simon T. Douglas, to-wit, on the 19th day of December, 1934, the said Simon T. Douglas made, executed, and delivered a renewal note and chattel mortgage in like form on the said property and the increase thereof, which said mortgage secured a note in the sum of Nineteen Thousand Two Hundred Seventy (\$19,270.00) Dollars, and providing for further advances of Twenty Thousand (\$20,000.00), which said chattel mortgage was filed of record, but did not become



effective because of the death of the said Simon T. Douglas occurring as aforesaid prior to the acceptance thereof by the Defendant.

4. That on or about the 25th day of January, 1935, after the death of said Simon T. Douglas and before the appointment of any administrator, general or special, for his said estate, the Defendant herein seized and took possession of said property so described in said mortgage of December 27th, 1933, and gave notice of sale thereof, and did, pursuant to such notice, on the 5th day of February, 1935, hold and conduct a purported chattel mortgage [224] sale and sold all of the property so seized and possessed covered by said chattel mortgage.

5. That before the holding of said sale, and at the time thereof, the Defendant's officers, agents, and employees had been, and were given, actual notice that the contemplated sale was illegal, said notice being given by responsible persons who protested the holding of said sale and who called attention of said officers, agents, and employees to the fact that the said Simon T. Douglas was dead and that no administrator had been appointed for his estate, but, nevertheless, the Defendant proceeded to, and did, at said time, sell all and singular the property described and listed in said chattel mortgage of December 27, 1933.

6. At the time of the sale of said property, there was due and owing under said note and chattel mortgage of December 27, 1933, by said Simon T.

Douglas to the Defendant herein, the sum of Sixteen Thousand Three Hundred Twenty-eight and  $48/100$  (\$16,328.48) Dollars, and that the said property was sold by Defendant at said sale for the sum of Fifteen Thousand Two and  $10/100$  (\$15,002.10) Dollars, which amount of money the Defendant received and kept, and that the Defendant incurred at the said sale the sum of Three Hundred Seven and  $82/100$  (\$307.82) Dollars, costs and expenses of conducting said sale, and that after applying the said amount so received at said sale for said property to the said indebtedness and to the costs so incurred, there remained a balance unpaid under said note and chattel mortgage of One Thousand Six Hundred Ninety-Four and  $64/100$  (\$1,694.64) Dollars, and that claim therefor has since been duly filed by the Defendant herein with the said Plaintiff as administrator of the estate of Simon T. Douglas, deceased. That at the time of the said sale, to-wit, on the 5th day of February, 1935, weather conditions were inclement and such as to make the said time and date unfavorable for the sale and disposition of sheep and other property of character described in said chattel mortgage. [225]

7. That at the time of the said sale, on the 5th day of February, 1935, the said property so seized and sold by Defendant, being all of the property described in said chattel mortgage, was of the reasonable value of Seventeen Thousand (\$17,000.00) Dollars.



As conclusions of law from the foregoing facts, the Court decides that at the time of the execution of said chattel mortgage, to-wit, on the 27th day of December, 1933, and at the time of the seizure and sale of said property so covered by said chattel mortgage, there existed, and still exists, a statute in the State of Montana, the same being Section 10140 of the Revised Codes of the State of Montana, readings as follows:

“If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate.”

That the said statute suspended the right of exercise of the said power of sale contained in said mortgage, and at the time of the sale of said property, on the 5th day of February, 1935, the Defendant was proceeding without right and contrary to the law and subject to the penalty prescribed in said Section 10140, and under the said section, the Plaintiff is entitled to have and recover of and from the Defendant double the value of said property, to-wit, the sum of Thirty-four Thousand (\$34,000.00) Dollars, and that from the said judgment, the Defendant is entitled to a credit of the amount so received at said sale, to-wit, the sum of Fifteen Thousand

Two and 10/100 (\$15,002.10) Dollars, which includes the costs incurred in making said sale in the sum of Three Hundred Seven and 82/100 (\$307.82) Dollars, and the deficiency or balance remaining unpaid and unsatisfied of One Thousand Six Hundred Ninety-four and 64/100 (\$1,694.64) Dollars with interest on said balance at the rate of six and one-half per cent ( $6\frac{1}{2}\%$ ) from the date of said sale to the date hereof, said deficiency and interest amounting at this date to the sum of Two Thousand Three Hundred Sixty-four [226] and 23/100 (\$2,364.23) Dollars, making a total credit to which Defendant is entitled of Seventeen Thousand Three Hundred Sixty-six and 83/100 Dollars (\$17,366.83).

That Plaintiff is entitled to a judgment of this Court, after deducting said sums as credit for the sum of Sixteen Thousand Six Hundred Thirty-three and 17/100 (\$16,633.17) Dollars over and above all of said credits, and the Plaintiff is entitled to a judgment for the said remaining sum aforesaid with interest from the date hereof at the rate of six per cent (6%) per annum thereon until paid, and that Plaintiff is entitled to its costs and disbursements herein expended and incurred. Let judgment be entered accordingly.

Done in open Court this 5th day of March, 1941.

CHARLES N. PRAY

District Judge

[Endorsed]: Filed Mar. 5, 1941. [227]

Thereafter, on March 5, 1941, a Judgment was duly filed and Entered herein, and is in the words and figures following, towit: [228]

In the District Court of the United States  
in and for the District of Montana.

No. 1237.

E. B. Chapman, as Administrator of the Estate of  
Simon T. Douglas, deceased,

Plaintiff,

vs.

Regional Agricultural Credit Corporation of Spo-  
kane, Washington, A Corporation,

Defendant.

### JUDGMENT.

This cause came on regularly for hearing before the Hon. Chas. N. Pray, Judge presiding, sitting without a jury, on February 20, 1940, the Plaintiff appearing by his attorneys, Raymond E. Dockery and H. Leonard De Kalb, and the Defendant appearing by its attorneys W. Q. Van Cott, D. Eugene Livingston, and J. R. Wine, and witnesses having been sworn and examined, and the case having been closed, and the cause submitted to the Court for decision, and the Court having on the 20th day of February, 1941, by its opinion, resolved the issue in favor of plaintiff and against defendant, and the Court having made and entered herein Finding of Facts and Conclusions of Law, wherein and

whereby it was decided the Plaintiff do have judgment against the Defendant for the sum of herein set forth and costs.

It Is Accordingly Hereby Ordered, Adjudged, and Decreed that the plaintiff do have and recover of and from the defendant the sum of Sixteen Thousand Six Hundred Thirty-three and 17/100 (\$16,633.17) Dollars together with interest thereon from the date hereof at the rate of Six per cent (6%) per annum until paid, and for Plaintiff's costs and disbursements herein in the sum of \$116.90.

Done in open Court this 5th day of March, 1941.

CHARLES N. PRAY

District Judge.

[Endorsed]: Filed and Ent. March 5, 1941. C. R. Garlow, Clerk. By Max Jenks, Deputy. [229]

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Thereafter, on March 12, 1941, a Motion for New Trial was duly filed herein, being in the words and figures following, towit: [230]

[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Comes now the defendant above named and in the event that its motion to vacate the judgment heretofore entered on March 5, 1941 and to enter judgment for defendant is denied, moves this Honorable Court for an order granting a new trial for the reason that the judgment heretofore entered is against law, for the various reasons advanced

by defendant in the trial of the case and in briefs submitted to the court, and for the further reason that the judgment heretofore entered is the imposition of a penalty against a corporation created and wholly owned by and an instrumentality of the United States contrary to law.

This motion is made upon the minutes of this court and upon the evidence, proceedings, pleadings and record in said cause.

W. Q. VAN COTT

D. E. LIVINGSTON

Attorneys for Defendant

State of Utah

County of Salt Lake—ss.

W. Q. Van Cott, being first duly sworn, deposes and says that he is one of the attorneys for the defendant above named, residing at Salt Lake City, Utah; that there is regular communication by United States mail between Salt Lake City and Lewistown, Montana, the residence of H. Leonard DeKalb and Raymond E. Dockery, [231] the attorneys for the plaintiff above named; that on March 11, 1941 prior to 4:00 o'clock P. M. affiant deposited in said United States mail enclosed in a sealed envelope, postage by airmail prepaid, addressed to said H. Leonard DeKalb and Raymond E. Dockery, at their post office address, to wit, Lewistown, Montana, a full, true and correct copy of the foregoing motion for new trial.

W. Q. VAN COTT



Subscribed and sworn to before me this 11th day of March, 1941.

[Seal] ANNE OHLIN

Notary Public residing at Salt Lake City, Utah

My commission expires June 18, 1941.

[Endorsed]: Filed March 12, 1941. C. R. Garlow, Clerk. [232]

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Thereafter, on March 12, 1941, a Motion to Vacate Judgment For Plaintiff and to Enter Judgment for Defendant was duly filed herein, being in the words and figures following, towit: [233]

[Title of District Court and Cause.]

MOTION TO VACATE JUDGMENT FOR  
PLAINTIFF AND TO ENTER JUDGMENT  
FOR DEFENDANT

Comes now the defendant in above entitled cause and hereby moves the above entitled court to enter an order herein vacating the Judgment entered in said cause in favor of plaintiff and against defendant on March 5, 1941, and to make and enter a judgment in said cause dismissing plaintiff's complaint on file herein upon the merits and awarding defendant its costs herein necessarily expended. This motion is based upon the following grounds:

1. It is established without contradiction in this case that defendant was created and wholly owned by the United States of America as an instrumen-



tality thereof. The Judgment entered herein on March 5, 1941, as aforesaid is for a penalty under the provisions of Section 10140, Revised Codes of Montana, 1935, as fully appears from the Findings of Fact and Conclusions of Law herein pursuant to which said Judgment was made and entered. By reason of the fact that defendant was an instrumentality of said United States of America wholly owned thereby, defendant, as matter of law, has never been liable for a penalty and no cause of action for such penalty has ever vested or could vest in plaintiff and said judgment for such penalty is unlawful.

2. The said Montana statute is inapplicable to the case presented to the court for the reasons asserted by defendant at the trial and in its briefs.

This motion is made upon the minutes of the above entitled [234] court and upon the evidence, proceedings, pleadings and record in said cause.

W. Q. VAN COTT

D. E. LIVINGSTON

Attorneys for Defendant

State of Utah,  
County of Salt Lake—ss.

W. Q. Van Cott, being first duly sworn, deposes and says: that he is one of the attorneys for the defendant above named, residing at Salt Lake City, Utah; that there is regular communication by United States mail between Salt Lake City and Lewistown, Montana, the residence of H. Leonard

DeKalb and Raymond E. Dockery, the attorneys for the plaintiff above named; that on March 11, 1941, prior to 4 o'clock P. M., affiant deposited in said United States mail, enclosed in a sealed envelope, postage by airmail prepaid, addressed to said H. Leonard DeKalb and Raymond E. Dockery, at their post office address, to wit, Lewistown, Montana, a full, true and correct copy of the above motion to vacate judgment for plaintiff and to enter judgment for defendant.

W. Q. VAN COTT

Subscribed and sworn to before me this 11th day of March, 1941.

My commission expires June 18, 1941.

[Seal]

ANNE OHLIN,

Notary Public, residing at Salt Lake City, Utah.

[Endorsed]: Filed March 12, 1941. C. R. Garlow,  
Clerk. [235]

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Thereafter, on March 12, 1941, Objections To and Motions To Amend Findings of Fact and Conclusions of Law, were duly filed herein, being in the words and figures following, to wit: [236]

[Title of District Court and Cause.]

OBJECTIONS TO AND MOTIONS TO AMEND  
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the defendant and objects to and moves the court to amend the Findings of Fact and make additional Findings of Fact as follows:

1. Moves the court to amend its Findings of Fact by finding that prior to the death of Simon T. Douglas and at the time of the seizure and sale of the property mortgaged by him to defendant the indebtedness owing by him to defendant was in default.

2. Moves the court to amend its Findings of Fact by finding that, following the death of Simon T. Douglas on January 12, 1935, and before the seizure of the mortgaged property and sale thereof by defendant, defendant notified the sole heir of Simon T. Douglas that she must arrange to assume responsibility for the mortgaged property and indebtedness, or foreclosure sale would be necessary and that said sole heir notified defendant that she was not going to assume such responsibility. [237]

3. Moves the court to amend its Findings of Fact by finding that, following the warning given by defendant to the sole heir of Simon T. Douglas that arrangements must be made to assume responsibility for the mortgaged property and the declination of said sole heir so to do, defendant was under the necessity of advancing funds for the care and preservation of the mortgaged property.

4. Objects to that part of the Finding contained in paragraph 5 that any of defendant's officers, agents and employes had been given notice prior to the commencement of the sale, that said sale was claimed to be illegal.

5. Moves the court to amend its Findings of Fact by finding that defendant, in seizing and sell-

ing the property mortgaged to it by the decedent, Simon T. Douglas, did so openly and with notice to all persons concerned and that the acts of the defendant in that regard were without secrecy or concealment.

6. Moves the court to amend its Findings of Fact by finding that the defendant in seizing and selling the mortgaged property was attempting to protect its security and was not attempting to take advantage of the heirs or creditors of the decedent, Simon T. Douglas, or attempting to divert the assets of his estate from those entitled thereto.

7. Objects to the finding of the court in paragraph 6 that at the time of the sale on February 5, 1935, weather conditions were unfavorable for the sale and disposition of sheep and other property included in the chattel mortgage.

8. Moves the court to amend its Findings of Fact by finding that the defendant in conducting the sale of the mortgaged property used its best efforts to secure the best possible liquidation and that there was no collusion to sell any of the mortgaged property for less than the best possible price available. [238]

9. Moves the court to amend its Findings of Fact by finding that defendant gave notice of the proposed sale of the mortgaged chattels as required by law; that during said period of notice no persons made any claim that said sale was invalid or illegal; and that the only claim of invalidity or illegality was made at the time and place when and where said sale was being held pursuant to said notice.



10. Moves the court to amend its Findings of Fact by finding that the only statements made to the effect that the proposed sale of the mortgaged property was invalid or illegal were made by persons not shown to be connected with the estate of Simon T. Douglas or the heir or creditors of Simon T. Douglas.

11. Moves the court to amend its Findings of Fact by finding that the sale of the mortgaged property was well attended by numerous responsible bidders, able and willing to bid at the sale of the mortgaged property, and that they did so bid competitively.

12. Objects to the finding of the court in paragraph 7 that the property seized and sold by the defendant, being all of the property described in said chattel mortgage, was of the reasonable value of \$17,000.00.

13. Moves the court to amend its Findings of Fact by finding that the reasonable market value of the mortgaged property sold by defendant on February 5, 1935, was not in excess of \$15,002.10.

14. Moves the court to amend its Findings of Fact by finding that at the time of the seizure and sale of the mortgaged property the mortgage from Simon T. Douglas to defendant dated December 27, 1933 was in full force and effect; that the debt secured thereby was in default; and that said mortgage contained a power to sell the mortgaged property. [239]

15. Moves the court to amend its Findings of



Fact by finding that defendant is a corporation created by the United States; that all of the stock thereof was and is owned by the United States, and that it is an instrumentality of the United States.

Comes now the defendant and objects to and moves the court to amend its Conclusions of Law and make additional Conclusions of Law as follows:

1. Objects to the Conclusion of Law of the court that Section 10140 of the Revised Codes of Montana, 1935, suspended the right of exercise of the power of sale contained in the chattel mortgage from the decedent, Simon T. Douglas, to defendant.

2. Moves the court to amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, is not applicable to a sale made under a power of sale in a mortgage such as that involved in this case.

3. Moves the court to amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, is inapplicable to a mortgagee acting in good faith under a power of sale.

4. Moves the court to amend its Conclusions of Law by concluding that defendant in selling the mortgaged property was acting in good faith.

5. Moves the court to amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana, 1935, does not apply unless there is an alienation made with intent wrongfully or fraudulently to deprive the estate, heirs or creditors of assets of the decedent's estate. [240]

6. Objects to the Conclusion of Law that defendant, in making the sale of mortgaged property on February 5, 1935, was proceeding without right and contrary to law and subject to the penalty prescribed in Section 10140, Revised Codes of Montana, 1935.

7. Objects to the Conclusion of Law that pursuant to Section 10140, Revised Codes of Montana 1935, plaintiff is entitled to recover from defendant double the value of the property sold for the reason that the same is the imposition of a penalty against an instrumentality of the United States Government.

8. Objects to the Conclusion of Law that plaintiff is entitled to a judgment of the court for the sum of \$16,633.17 for the reason that such judgment constitutes the imposition of a penalty against an instrumentality of the United States.

9. Moves the court to amend its Conclusions of Law by concluding that Section 10140, Revised Codes of Montana 1935, provides for a penalty which cannot be imposed on the defendant because it is a corporation created and wholly owned by, and an instrumentality of, the United States.

Respectfully submitted,

W. Q. VAN COTT,

D. E. LIVINGSTON,

Attorneys for Defendant. [241]

State of Utah,  
County of Salt Lake—ss.

W. Q. Van Cott, being first duly sworn, deposes and says that he is one of the attorneys for the defendant above named, residing at Salt Lake City, Utah; that there is regular communication by United States mail between Salt Lake City and Lewistown, Montana, the residence of H. Leonard DeKalb and Raymond E. Dockery, the attorneys for the plaintiff above named; that on March 11, 1941, prior to 4 o'clock P. M., affiant deposited in said United States mail, enclosed in a sealed envelope, postage by airmail prepaid, addressed to said H. Leonard DeKalb and Raymond E. Dockery at their post office address, to wit: Lewistown, Montana, a full, true and correct copy of the hereto attached Objections to and Motions to Amend Findings of Fact and Conclusions of Law.

W. Q. VAN COTT

Subscribed and sworn to before me this 11th day of March, 1941.

[Seal]

ANNE OHLIN,

Notary Public, Residing at Salt Lake City, Utah.

My commission expires June 18, 1941.

[Endorsed]: Filed March 12, 1941. C. R. Garlow, Clerk. [242]

Thereafter, on March 17, 1941, Plaintiff's Brief on Defendant's Objections To and Motion To Amend Findings of Facts and Conclusions of Law, was duly filed herein, being in the words and figures following, to wit: [243]

[Title of District Court and Cause.]

PLAINTIFF'S BRIEF ON DEFENDANT'S OBJECTIONS TO AND MOTION TO AMEND FINDING OF FACTS AND CONCLUSIONS OF LAW.

We shall give consideration to the fourteen specifications set forth in defendant's motion in the order enumerated.

1. Finding No. 2 of the Court shows that the chattel mortgage foreclosed fell due on the 15th day of December, 1934. We submit there is no purpose to be subserved in disturbing the finding with any amendment. The amendment suggested is a conclusion of law from the fact set forth in Finding No. 2.

2. The suggested Finding No. 2 has no basis in the evidence. Besides, it is wholly unnecessary, if it were true. The testimony in the record discloses that a conference was had with Mr. and Mrs. Worthington. A telegram was sent, indicating that it was necessary to assume all indebtedness, not alone that of the Regional, but all other. It is not essential to the rights of either party that this be detailed in the findings. There is no evidence to support the fact sought to be injected by amendment.

“That said sole heir notified defendant, that she was not going to assume such responsibility.”

3. It is neither necessary nor is there any ground for amending the findings to include what is sought to be included in the findings under paragraph No. 3 of the suggested amendments. There is no issue or controversy over what the evidence shows in connection therewith, nor is there any point which will be preserved by the granting of the third request. [244]

4. The finding of the Court No. 5 is based upon uncontroverted evidence and is an essential part of the Court's findings. In one view of the case, it is an indispensable finding.

5. The findings have been drawn, we believe, with scientific accuracy and correctly set forth the facts from which all legitimate inferences may be drawn. Under the authorities, it is wholly immaterial how openly the sale proceedings were conducted. No issue was made upon that matter, and the findings, this one included, resolve all of the issues. The defendant has not the right to ask for any such finding because it is wholly immaterial under the facts adduced at the trial.

6. The sixth suggested amendment is wholly immaterial, is contrary to the theory upon which the decision, the finding of facts, conclusions of law and decree have been entered. Under the decisions, good faith is not a defense. Under the statute, which is the basis for the decision, good faith is not a defense, and if it were a defense, good faith is out of



the controversy, inasmuch as the essential element of good faith is a want of knowledge, and the uncontroverted evidence shows notice and knowledge of the illegality of the proceedings to foreclose. It is not material with what motive defendant proceeded.

7. In the opinion of the Court and in harmony with all of the evidence, paragraph No. 6 correctly sets forth the weather condition. Clearly, the seventh objection of defendant should be lightly regarded.

8. By the eighth suggested amendment defendant persists in an attempt to inject into the findings a construction of the law upon which defendant has had its day in Court. It is wholly immaterial what efforts were put forth to make the sale if the act was tortuous. As we have heretofore pointed out, good faith is out of the case, both by virtue of the law and by virtue of the facts which the Court has found.

9. In the findings, every essential thing suggested by proposed amendment No. 9 is in the findings. It is immaterial at what state of the proceedings prior to the disposition of the property notice of illegality was given, nor was notice of any kind necessary under the Montana statute upon which the action is based. The rule of accountability does not permit a plea of ignorance of the law. [245]

10. The suggested finding No. 10 injects a new note into the law, inasmuch as it seems to be assumed that notice and knowledge of illegality must be derived from persons in interest. The theory

upon which the findings were made does not take into account the necessity of any notice.

11. Where there is no issue in the case concerning the number or character of bidders at the sale, the finding is wholly immaterial.

12. The twelfth offered objection is based upon conflicting evidence which the Court has resolved and cannot be reopened except by a new trial.

13. The thirteenth offer of amendment and objection is like unto the twelfth, based upon conflicting evidence.

14. The reference to the mortgage in Finding No. 12 fully covers every feature of the fourteenth ground of motion. The mortgage is in evidence. None of its terms are in dispute. It speaks for itself. Such power of sale as it contains is before this or any Court that will review it.

15. The fifteenth finding is wholly immaterial. No controversy exists with regard thereto. The fact was conceded at the trial and stands out as a fundamental, undisputed issue.

As to the nine suggested amendments of the conclusions of law, it may be said simply and once and for all that their adoption would bring about a contrary result. The law has been fully argued; the facts fully considered, and there is no further consideration of such points possible except a new trial be granted.

In support of the general principles reflected in the resistance of defendant's motion to amend findings, etc., we cite the following authorities:

In the first place, under the new rules, it is not necessary to reserve any rights that any request for findings be made.

Rule 52, Subdivision (a)

In

8 Enc. of Proc. 1024,

It is said:

“If the truth or falsity of each material allegation in issue can be demonstrated from the findings, the law is complied with.” [246]

The rule with regard to findings is entirely satisfied by determining the issues of fact as they were made at the trial as distinguished from the pleadings. Thus, the rule is stated in

8 Enc. of Proc. 1042,

which reads as follows:

“The general rule is satisfied, if all the facts essential to a recovery, and which are controverted by the evidence upon the trial, are especially found, that is, findings may be sufficient though they do not find all the facts, which, though put in issue in the pleadings, are yet not controverted on the trial, by the evidence, or on the other hand, are established by the undisputed evidence, admitted by the pleadings, or by stipulation of the parties.”

Findings are not necessary on immaterial issues of fact.

“Nothing more is required than that the material issues should be covered by the findings;

a failure to make findings of fact upon immaterial issues is not error."

8 Enc. of Proc. 1045.

Again, it is said:

"When the Court finds on an issue that ultimately determines and necessarily supports the judgment rendered, or when it finds facts which require the judgment rendered, other issues in the case become immaterial, and a failure to find thereon, or error in such other findings, becomes immaterial and is not ground for reversal on appeal."

8 Enc. of Proc. 1045, 1046, 1047.

The recital of evidence is not required or proper.

"Findings of fact should be statements of the ultimate or controlling facts which are proved and not merely of the evidence or subordinate facts upon which they are based."

8 Enc. of Proc. 1048;

*Wilson v. Merchants Loan*, 183 U. S. 121, 46 L. Ed. 113;

*Davenport v. Paris*, 136 U. S. 580, 34 L. Ed. 548.

In fact, what defendant requires is violative of the rule with regard to proper findings. In

8 Enc. of Proc. 1053, 1054,

it is said:

"As the findings should contain only the ultimate facts, the mere setting out of all the evidence in the cause, conflicting and undisputed,

as appears in a bill of exception, and rendering [247] judgment thereon, does not constitute a finding of the ultimate issues of fact as required by the statutes, and cannot be made the basis of a judgment. Such a finding will be set aside if made, and it is proper for the court to refuse to make findings which are mere recitals of evidence and not of the ultimate facts.

So too, the court is not bound to include in its findings evidentiary facts leading to or bearing upon the ultimate facts; and such matters in a finding of fact must be disregarded, except to the extent that they tend to explain or give color to the findings of ultimate facts."

Throughout the proposed amendments and in suggested findings, counsel have urged upon the court, findings that were designed to show good faith. Where this statute has been under consideration, it is wholly immaterial.

In

*Sails v. Whitman* (Okla) 42 Pac. 2d 275

it is said:

"Wrongful depends not so much on the state of mind as upon the acts done."

Again it is said:

"Statute requires no wrongful intention and none is required other than intention to do the thing which the law forbids."



In

Litz v. Exchange Bank, 15 Okla. 864, 83 Pac.  
790

where good faith was acknowledged, the court said that such an act constituted of and "was a wrongful intermeddling with the property."

See also

Jahns v. Nolting 29 Cal. 508

Respectfully submitted,

H. LEONARD DeKALB

RAYMOND E. DOCKERY,

Attorneys for Plaintiff.

[Endorsed]: Filed March 17, 1941. C. R. Garlow,  
Clerk. By C. G. Kegel, Deputy. [248]

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Thereafter, on July 17, 1941, an Order denying defendant's Motion for New Trial, Motion to Vacate Judgment, Motion to Enter Judgment in favor of defendant, and Motion to Amend Findings of Fact and Conclusions of Law, was duly filed and entered herein, being in the words and figures following, to-wit: [249]

[Title of District Court and Cause]:

The Court has considered all of the four motions and seven briefs submitted in the above entitled cause since the entry of judgment for the plaintiff, and after such consideration is convinced that the findings and conclusions adopted by the Court subsequent to decision of the case in favor of plain-

tiff are sufficient; for that reason, the Court being duly advised, and good cause appearing therefor, the proposed amendments of defendant are hereby overruled and denied.

In the opinion of the Court the other three pending motions of the defendant should likewise be overruled and denied, and it is so ordered.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed and entered July 17, 1941. C. R. Garlow, Clerk. By Max Jenks, Deputy. [250]

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Thereafter, on September 17, 1941, a Notice of Appeal was duly filed herein, being in the words and figures following, to-wit: [251]

[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice is hereby given that Regional Agricultural Credit Corporation of Spokane, Washington, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment in favor of plaintiff and against defendant entered in this action on March 5, 1941.

W. Q. VAN COTT,  
D. EUGENE LIVINGSTON,  
Attorneys for Defendant and  
Appellant.

[Endorsed]: Filed Sept. 17, 1941. C. R. Garlow, Clerk. [252]

Thereafter, on September 17, 1941, a Stipulation and Order regarding Bond on Appeal, and Staying Execution pending appeal, was duly filed and entered herein, being in the words and figures following, to-wit: [253]

[Title of District Court and Cause.]

STIPULATION REGARDING BOND FOR  
COSTS ON APPEAL AND FOR SUPERSE-  
DEAS BOND AND CONSENTING TO  
STAY OF EXECUTION PENDING AP-  
PEAL.

Pursuant to Rule 62 paragraph (2) of Rules of Procedure for the District Courts of the United States, the parties above named hereby stipulate that the defendant is not required to file bond for costs on appeal or supersedeas bond as described in Rule 73 paragraphs (c) and (d) of said Rules of Procedure and that the court may make an order staying execution pending appeal herein.

Dated July 25th, 1941.

W. Q. VAN COTT

D. E. LIVINGSTON,

Attorneys for Plaintiff

H. LEONARD DE KALB,

RAYMOND E. DOCKERY,

Attorneys for Defendant.

Pursuant to the foregoing stipulation it is hereby ordered that execution herein is stayed pending appeal.

CHARLES N. PRAY,  
Judge.

Dated Sept. 17th, 1941.

[Endorsed]: Filed and entered, Sept. 17, 1941.  
C. R. Garlow, Clerk. [254]

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Thereafter, on September 22, 1941, a Designation of Portions of Record on Appeal, was duly filed herein, being in the words and figures following, to-wit: [255]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD,  
PROCEEDINGS AND EVIDENCE TO BE  
CONTAINED IN THE RECORD ON AP-  
PEAL.

Appellant hereby designates the following portions of the record, proceedings and evidence in the above entitled case to be contained in the record on appeal:

1. Original complaint (part of transcript of record on removal from State court filed in the United States District Court July 10, 1935). Exhibit A may be omitted because it is a copy of item No. 22 hereof. Exhibit B may be omitted because it is im-

material. Exhibits C and D may be omitted because they are copies of item No. 20 hereof.

2. Summons and attached Sheriff's Return of Service (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).

3. Notice of Presentation of Petition and Bond for Removal (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).

4. Affidavit of Service of Petition for Removal (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).

5. Petition for Removal (part of transcript of record on removal from State Court filed in the United States District [256] Court July 10, 1935).

6. Bond on Removal (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).

7. Affidavit of Service by Mail (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).

8. Order of Removal by State Judge McConohie (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).

9. Certificate by Clerk of State Court certifying Transcript on Removal (part of transcript of record on removal from State Court filed in the United States District Court July 10, 1935).



10. Amended Demurrer filed August 8, 1935 (including order dated November 18, 1935 on the blue cover thereof signed by District Judge Charles N. Pray reading, "The within demurrer came on regularly for hearing under Rule 40 (2) of the Rules of this court and having been duly considered and the court being advised and good cause appearing therefor the said demurrer is hereby sustained as to both paragraphs thereof with leave to amend within ten days from receipt of notice hereof.").

11. All briefs filed by the parties in regard to the amended demurrer to the original complaint understood by defendant and appellant to be as follows:

Two page brief commencing with the words, "The complaint in this case is predicated upon the provisions of Section 10140 Revised Codes of Montana for the year 1921 reading as follows:" and signed Raymond E. Dockery and Belden & DeKalb, Attorneys for Plaintiff, and probably filed on or about September 27, 1935.

Defendant's brief on Demurrer consisting of 13 pages signed J. R. Wine, attorney for defendant, and probably filed [257] on or about October 5, 1935.

Plaintiff's reply Brief on Demurrer consisting of 7 pages signed Belden & DeKalb and Raymond E. Dockery, Attorneys for Plaintiff, and probably filed October 17, 1935.

Defendant's Reply Brief consisting of 4 pages, signed J. R. Wine, Attorney for Defendant, probably filed October 28, 1935.

12. Amended Complaint filed November 29, 1935.
13. Demurrer to Amended Complaint filed December 3, 1935.
14. Entered Order overruling demurrer to amended complaint dated May 12, 1936.
15. Answer and Cross Complaint filed January 25, 1936. Exhibit A, copy of the chattel mortgage dated December 27, 1933, may be omitted because it is a copy of item No. 22 hereof. Exhibit B may be omitted because it is a copy of item No. 20 hereof. Exhibit C may be omitted because it is immaterial.
16. Reply filed July 29, 1936.
17. Motion to Strike from Reply filed August 18, 1936.
18. Amended Reply filed November 6, 1937. Exhibit A, chattel mortgage dated December 19, 1934, may be omitted because it is immaterial.
19. Stipulation filed January 11, 1940.
20. Exhibit No. 1 introduced in evidence February 20, 1940.
21. Exhibit No. 2, Promissory Note, introduced in evidence February 20, 1940.
22. Exhibit No. 3, Chattel Mortgage, introduced in evidence February 20, 1940.
23. Exhibit No. 4, copy of telegram introduced in evidence February 20, 1940.
24. Exhibit No. 5, telegram introduced in evidence February 20, 1940.
25. Exhibit No. 6, copies of letters introduced in [258] evidence February 20, 1940.

26. Exhibit No. 7, consisting of four pages, introduced in evidence February 20, 1940.

27. Exhibit No. 8, Power of Attorney, introduced in evidence February 20, 1940.

28. Exhibit No. 9, Application for Renewal, introduced in evidence February 20, 1940.

29. Transcript of evidence and proceedings at trial, two copies of which are transmitted herewith.

30. Memorandum of Decision filed February 20, 1941.

31. Findings of Fact and Conclusions of Law filed March 5, 1941.

32. Judgment filed, entered and docketed March 5, 1941.

33. Motion for New Trial filed March 12, 1941.

34. Motion to Vacate Judgment and to enter Judgment for Defendant filed March 12, 1941.

35. Objections to and Motions to amend Findings of Fact and Conclusions of Law filed March 12, 1941.

36. Plaintiff's brief on Defendant's Objections to and Motion to Amend Findings of Fact and Conclusions of Law filed March 17, 1941.

37. Order Denying Motion for New Trial, Motion to Vacate Judgment and to Enter Judgment for Defendant and Objections to and Motion to Amend Findings of Fact and Conclusions of Law filed July 16, 1941.

38. Notice of Appeal.

39. Stipulation regarding Bond for Costs on

Appeal and for Supersedeas Bond and Consenting to Stay of Execution Pending Appeal.

40. Order Staying Execution pending Appeal.

41. Designation of Portions of Record, Proceedings and Evidence to be contained in the record on appeal. [259]

42. Statement of Points pursuant to Rule 75, paragraph (d).

W. Q. VAN COTT

D. EUGENE LIVINGSTON

Attorneys for Appellant

State of Utah,  
County of Salt Lake—ss.

D. Eugene Livingston, being first duly sworn, deposes and says:

That he is one of the attorneys for the above named defendant with offices in Salt Lake City, Utah; that the offices for Plaintiff's attorney, H. Leonard DeKalb, are in Lewistown, Montana; that there is regular communication by mail between Salt Lake City, Utah and Lewistown, Montana; that affiant on September 19, 1941, prior to 5:00 P. M., deposited in the U. S. mail, postage prepaid, addressed to H. Leonard DeKalb, Montana Building, Lewistown, Montana, a full, true and correct copy of the foregoing Designation of Portions of

Record, Proceedings and evidence to be Contained in the Record on Appeal.

D. EUGENE LIVINGSTON

Subscribed and sworn to before me this 19th day of September, 1941.

[Seal] ANNE OHLIN

Notary Public. Residing at Salt Lake City, Utah.

My commission expires June 18, 1945.

[Endorsed]: Filed Sept. 22, 1941. C. R. Garlow, Clerk. [260]

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Thereafter, on September 22, 1941, Statement of Points on Which Appellant Intends to Rely on Appeal, was duly filed herein, being in the words and figures following, to-wit: [261]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL.

Inasmuch as appellant is not designating for inclusion the entire record and all proceedings and evidence in the action, it hereby makes the following statement of the points on which it intends to rely on the appeal:

1. Section 10140, Revised Codes Montana 1935, is inapplicable to a sale made pursuant to a power of sale. Such a power is coupled with an interest, survives the death of the mortgagor and is not sus-



pended by the Montana statute. A state statute is incompetent to suspend a right of the United States or its instrumentalities.

2. The Montana penalty statute, Section 10140 Revised Codes Montana 1935, is a highly penal statute, and should not have been applied to the case at bar because there was no evidence that the sale of the mortgaged assets was fraudulent or pursuant to any wrongful motive or for the purpose of wrongfully depriving decedent's estate of its assets.

3. There is no substantial evidence to sustain the court's finding that the reasonable value of the property sold was \$17,000.00. The evidence conclusively and without contradiction showed that the property sold for its full value, \$15,002.10.

4. It is undisputed that plaintiff had a first lien on the property sold and was entitled to the proceeds thereof up to the extent of the debt owing. If the property sold for its full value plaintiff was not damaged because not enough was realized to pay defendant's debt. If it sold for less than its full value the damage is only the difference between the sale price and the full value and the penalty should be applied if at all only to such difference. [262]

5. Defendant is a wholly owned instrumentality of the United States Government and is not subject to the penalty provisions of the Montana Statute.

W. Q. VAN COTT

D. EUGENE LIVINGSTON

Attorneys for Appellant.

State of Utah,  
County of Salt Lake—ss.

D. Eugene Livingston, being first duly sworn, deposes and says:

That he is one of the attorneys for the above named defendant with offices in Salt Lake City, Utah; that the offices for plaintiff's attorney, H. Leonard DeKalb, are in Lewistown, Montana; that there is regular communication by mail between Salt Lake City, Utah, and Lewistown, Montana; that affiant on September 19, 1941, prior to 5:00 P. M., deposited in the U. S. mail, postage prepaid, addressed to H. Leonard DeKalb, Montana Building, Lewistown, Montana, a full, true and correct copy of the foregoing Statement of Points on which Appellant intends to rely on Appeal.

D. EUGENE LIVINGSTON,

Subscribed and sworn to before me this 19 day of September, 1941.

[Seal]

ANNE OHLIN

Notary Public, Residing at Salt Lake City, Utah.

My commission expires June 18, 1945.

[Endorsed]: Sept. 22, 1941. C. R. Garlow, Clerk.

[263]

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Thereafter, on October 1, 1941, Objection to Designation of Portions of Record on Appeal, was duly filed herein by the plaintiff, and is in the words and figures following, to-wit: [264]

[Title of District Court and Cause.]

OBJECTION TO DEFENDANT AND APPELLANT'S DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN THE RECORD ON APPEAL.

The plaintiff now objects to the inclusion in the record on appeal of all of the following enumerated matters appearing in defendant and appellant's designation of portions of the record, etc., to be contained in the record on appeal, to-wit:

Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and designation 36 all on the ground that the same were superseded and became of no force or virtue upon the filing of amended pleadings, which latter are properly designated as proper portions of the record.

Plaintiff further objects to the omission from the amended reply of Exhibit "A" annexed thereto, as requested in defendant and appellant's designation No. 18.

This objection is made severally to the above enumerated designations of defendant and appellant on the ground that the same are wholly immaterial, wholly superseded, and result in confusion and in the encumbering of the record; and plaintiff specifies that briefs filed in the lower courts cannot be considered as a part of the record or appeal.

Respectfully submitted.

RAYMOND E. DOCKERY

H. LEONARD DE KALB

Attorneys for Plaintiff. [265]

State of Montana,  
County of Fergus—ss.

Raymond E. Dockery being first duly sworn deposes and says:

That he is one of the attorneys for the above named plaintiff, with offices in Lewistown, Montana; that the offices for defendants of attorneys W. Q. Van Cott and D. Eugene Livingston, are in Continental Bank Building, Salt Lake City, Utah; that there is regular communication of mail between Lewistown, Montana and Salt Lake City, Utah; that affiant, on September 30, 1941, prior to five o'clock P. M., deposited in the United States mail, postage prepaid, addressed to W. Q. Van Cott and D. Eugene Livingston, a full, true and correct copy of the foregoing Objection to Designations of Portions of Record, etc., to be contained in the record on appeal.      RAYMOND E. DOCKERY

Subscribed and sworn to before me this 30th day of September, 1941.      HAZEL K. HOPKINS

[Seal]

[266]

Notary Public for the State of Montana, Residing  
at Lewistown, Montana.

My Commission expires October 26, 1943.

[Endorsed]: Filed Oct. 1, 1941. C. R. Garlow,  
Clerk.

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Thereafter, on October 1, 1941, Designation of Additional Portion of Record on Appeal was duly filed herein, being in the words and figures following, to-wit:      [267]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTION  
OF RECORD TO BE INCLUDED IN TRAN-  
SCRIPT ON APPEAL.

Comes Now, the above named plaintiff and requests that the amended reply filed November 6th, 1937, together with Exhibit "A" and the chattel mortgage dated December 19, 1934, annexed thereto, shall be included in the record on appeal herein.

If the appellant includes in the record on appeal herein, his designations Nos. 1 to 11, and 18 and 36, then plaintiff designates his objections filed herein as a part of the record to be included in said appeal.

Respectfully submitted.

RAYMOND E. DOCKERY,

H. LEONARD DeKALB,

Attorneys for Plaintiff. [268]

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Thereafter, on October 14, 1941, an Order for Transmission of Original Exhibits was duly filed and entered herein, being in the words and figures following, to wit: [270]

[Title of District Court and Cause.]

ORDER

It being the opinion of the court that Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9, introduced in evidence at the trial of the above case, should be sent to the



Circuit Court of Appeals in lieu of copies, It Is Hereby Ordered that the same be forwarded by the Clerk of the Court to the Clerk of the Ninth Circuit Court of Appeals by registered mail.

CHARLES N. PRAY,  
Judge.

Dated October 14th, 1941.

[Endorsed]: Filed and entered October 14, 1941.  
C. R. Garlow, Clerk. [271]

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CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD.

United States of America,  
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 272 pages, numbered consecutively from 1 to 272, constitute a full, true and correct transcript of all portions of the record in case Number 1237, E. B. Chapman, as Administrator of the Estate of Simon T. Douglas, deceased, Plaintiff, vs. Regional Agricultural Credit Corporation of Spokane, Washington, a corporation, defendant, designated by the parties as the record on appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part of the record on appeal, original exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9, which were offered by the defendant and received in evidence at the trial of said cause.

I further certify that the costs of said Transcript amount to the sum of Fifty-four and 50/100ths Dollars (\$54.50) and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 14th day of October, A. D. 1941.

[Seal]

C. R. GARLOW,

Clerk U. S. Supreme Court,  
District of Montana,

By C. G. KEGEL,

Deputy Clerk. [272]

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[Endorsed]: No. 9956. United States Circuit Court of Appeals for the Ninth Circuit. Regional Agricultural Credit Corporation of Spokane, Washington, Appellant, vs. E. B. Chapman, as Administrator of the Estate of Simon T. Douglas, Deceased, Appellee. Transcript of Record upon Appeal from the District Court of the United States for the District of Montana.

Filed October 23, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals for  
the Ninth Circuit

Case No. 9956

REGIONAL AGRICULTURAL CREDIT COR-  
PORATION OF SPOKANE, WASHING-  
TON, a corporation,

Appellant,

vs.

E. B. CHAPMAN, as Administrator of the Estate  
of Simon T. Douglas, deceased,

Respondent.

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

Appellant hereby makes the following statement  
of the points on which it intends to rely on this  
appeal:

1. Section 10140, Revised Codes Montana 1935,  
is inapplicable to a sale made pursuant to a power  
of sale. Such a power is coupled with an interest,  
survives the death of the mortgagor and is not sus-  
pended by the Montana statute. A state statute is  
incompetent to suspend a right of the United States  
or its instrumentalities.

2. The Montana penalty statute, Section 10140  
Revised Codes Montana 1935, is a highly penal  
statute, and should not have been applied to the case  
at bar because there was no evidence that the sale  
of the mortgaged assets was fraudulent or pursuant

to any wrongful motive or for the purpose of wrongfully depriving decedent's estate of its assets.

3. There is no substantial evidence to sustain the court's finding that the reasonable value of the property sold was \$17,000.00. The evidence conclusively and without contradiction showed that the property sold for its full value, \$15,002.10.

4. It is undisputed that plaintiff had a first lien on the property sold and was entitled to the proceeds thereof up to the extent of the debt owing. If the property sold for its full value plaintiff was not damaged because not enough was realized to pay defendant's debt. If it sold for less than its full value the damage is only the difference between the sale price and the full value and the penalty should be applied if at all only to such difference.

5. Defendant is a wholly owned instrumentality of the United States Government and is not subject to the penalty provisions of the Montana statute.

W. Q. VAN COTT,

D. E. LIVINGSTON,

Attorneys for Appellants.

[272-A]

State of Utah,

County of Salt Lake—ss.

W. Q. Van Cott, being first duly sworn, deposes and says:

That he is one of the attorneys for the above named appellant with offices in Salt Lake City, Utah; that the offices for respondent's attorney, H. Leonard DeKalb, are in Lewistown, Montana; that there is regular communication by mail be-

tween Salt Lake City, Utah, and Lewistown, Montana; that affiant on October 30, 1941, prior to 5:00 P. M., deposited in the U. S. mail, postage prepaid, addressed to H. Leonard DeKalb, Montana Building, Lewistown, Montana, a full, true and correct copy of the foregoing Statement of Points on which Appellant Intends to Rely.

W. Q. VAN COTT

Subscribed and sworn to before me this 30th day of October, 1941.

[Seal]

SID. M. CORNWALL,  
Notary Public Residing at Salt Lake City, Utah.  
My commission expires July 21, 1942.

[Endorsed]: Filed Oct. 31, 1941. [272]

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[Title of Circuit Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD  
AS NECESSARY FOR CONSIDERATION  
OF THIS APPEAL

Appellant hereby designates as necessary for the consideration of this appeal the entire record certified by the Clerk of the District Court and the 9 original exhibits transmitted therewith, with the exception that the last document in the group of documents marked "Exhibit 1" is not necessary because it is a copy of the chattel mortgage dated December 27, 1933, the original of which was introduced as Exhibit 3.

W. Q. VAN COTT,

D. E. LIVINGSTON,

Attorneys for Appellant.



State of Utah,  
County of Salt Lake—ss.

W. Q. Van Cott, being first duly sworn, deposes and says:

That he is one of the attorneys for the above named appellant with offices in Salt Lake City, Utah; that the offices for respondent's attorney, H. Leonard DeKalb, are in Lewistown, Montana; that there is regular communication by mail between Salt Lake City, Utah, and Lewistown, Montana; that affiant on October 30, 1941, prior to 5:00 P. M., deposited in the U. S. mail, postage prepaid, addressed to H. Leonard DeKalb, Montana Building, Lewistown, Montana, a full, true and correct copy of the foregoing Designation of Portions of Record as Necessary For Consideration of This Appeal.

W. Q. VAN COTT

Subscribed and sworn to before me this 30th day of October, 1941.

[Seal]

SID. M. CORNWALL,

Notary Public Residing at Salt Lake City, Utah.

My commission expires: July 21, 1942.

